Godina XIII 2011. Broj 1.

YU ISSN 1450-7986
UDK 34: 061.1(4)

REVIJA ZA EVROPSKO PRAVO

periodični časopis Udruženja za evropsko pravo

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Radovi podležu anonimnoj recenziji. Radovi svrstani u rubriku "članci" se tretiraju kao izvorni naučni radovi, a oni svrstani u rubriku "prilozi", kao stručni radovi.

Časopis izlazi periodično

Tiraž: 500

Štampa: Interprint, Kragujevac

Predlog za citiranje: REP., XIII(2011) 1.
Na osnovu mišljenja Ministarstva za nauku i tehnologiju broj 413-00-435/99-01, od 13. 01. 2000. godine, Revija je oslobođena poreza.

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ČLANCI

REVIEW OF EUROPEAN LAW

Periodical Review of the Association for European Law

Volume XIII 2011 No. 1

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UDK: 342.2(497.11)+339.9(4-672EU)

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CONSTITUTIONAL CHANGES AND ENFORCEMENT OF SAA IN THE WESTERN BALKANS: COMPARATIVE EXPERIENCES WITH THE EUROPE AGREEMENTS

INTRODUCTION

With the initiation of the Stabilisation and Association Process in the Western Balkans, the EU formulated a new generation of association agreement with the States of this region.[1] The Stabilisation and Association Agreements ("SAAs") form an integral part of the process, providing the main legal basis of relations between the Union and the relevant (potential) candidate country. The scheme and contents of the SAAs were largely inspired by and founded upon the earlier Europe Agreements ("EAs") with ten Central and East European countries ("CEECs").

These EAs were, in large part, novel creations to deal with the novel situation of the collapse of the Communist regimes and the (re-)birth of democracies wishing to "return to Europe." It was clear to the then European Communities that the CEECs' road to membership was likely to be longer than previous

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1 On the issue of enlargement, see generally, A.F. Tatham, ***Enlargement of the European Union***, Kluwer Law International, Alphen aan den Rijn (2009).

accession rounds with the result that, while the enlargement process underwent development and re-orientation, the EAs remained solidly at the centre of the process providing it with an immutable legal basis.

In this context, the CEECs would be under pressure – in the time leading up to membership – not only to adopt and implement EU law but also to enforce it. Thus harmonisation of a CEEC's laws and legal system to the Union carried with it an implicit recognition that national administrations and judiciaries would be under some sort of an obligation gradually to align their practices with those of the EU, pending accession.

However, this need to ensure homogeneity in the enforcement of the acquis in the Union and in the candidate countries proved to be a relentless and seemingly irresolvable problem of the pre-accession period. With limited Treaty-based provisions in the EAs actually requiring homogenisation, experience of the CEECs in the 1990s and early 2000s brought to light difficulties their courts faced in trying to apply the ***acquis*** before accession, which in many ways may be played out again as the States of the Western Balkans edge towards EU membership.

The aim of this paper then is to analyse various decisions of national constitutional courts in the CEECs concerning the provisions of their EAs with the EU. In highlighting this experience, it is hoped to shed some light on the situation that Western Balkan courts will face with respect to the judicial enforcement of various provisions of the SAAs in the period before joining the Union. In order to underline the relevancy of this thesis, the present author has taken the example of the SAA signed by the EU, its Member States and Serbia which is currently undergoing ratification.[2]

However, the context of this work requires first a brief appraisal of the obligation of judicial co-operation that is incumbent on Member State courts to enforce EU law and protect rights deriving from it in cases before them. This will then be followed by a discussion on the homogeneity provisions in the EAs and a comparison with those in the EU-Serbia SAA. The following section focuses on certain cases brought before CEEC constitutional courts regarding their respective EAs, and the work will conclude with a discussion

[2] Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part: COM(2007) 743.

on the possible constitutional implications of the SAA for Serbia in the light of CEEC experiences.

The EU context of judicial co-operation in ensuring enforcement of EU law in the Union

The success or otherwise of the Internal Market and EU law generally is dependent on national judicial and administrative systems. The support and co-operation of national authorities, including courts,[3] is indispensable since much EU law is applied at national level. Put simply, the Union legal order would be instantly deprived of its ***sui generis*** characteristics[4] were support from national institutions, including, and perhaps especially, courts, to be withdrawn. Article 4(3) TEU provides a basic statement of the obligations undertaken by Member States towards the Union:[5]

Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and shall refrain from any measure which could jeopardise the attainment of the Union's objectives.

The obligations in Article 4(3) TFEU are binding on Member States and consequently on all national authorities, whether they are executive, legislative or judicial.[6] The fact that the executive represents the Member State vis-à-vis the Union institutions does not free the legislature or judiciary from their obligations to respect and execute Union law: this is so even, if, according to their respective national constitutions they are independent and sovereign.[7]

Article 4(3) TEU obliges national courts effectively to protect the rights of individuals and companies deriving from EU law. In fact, the principles of

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3 Case 103/88 ***Fratelli Costanzo v. Comune di Milano*** [1989] ECR 1839.

4 On these points generally, see A.F. Tatham, ***EC Law in Practice: A Case-Study Approach***, HVG ORAC Lap- és Könyvkiadó, Budapest (2006), chapters 1-3, at 1-147.

5 Article 4(3) TEU was previously numbered Article 10 EC and originally numbered Article 5 EEC.

6 On this see Tatham (2006), at 96-97; and J. Temple Lang, Community Constitutional Law: Article 5 EEC Treaty, (1990) 27 ***CML Rev***. 645.

7 Case 167/73 ***Commission v. France*** [1974] ECR 359.

direct effect and primacy, created by the European Court of Justice ("ECJ"), have become part of a bolder and more ambitious principle of "effectiveness" which encapsulates the notion that EU law should confer rights plus remedies to render real the practical enjoyment of those rights.[8]

JUDICIAL ENFORCEMENT OF THE EUROPE AGREEMENTS

General duty to try and harmonise the law

Before addressing the requirements of homogeneity in the EAs, it is valuable to begin with a short discussion of the main legal bases for harmonisation of laws that were contained in the EAs. These clauses put the CEECs under a general duty to try and harmonise their laws which duty, with the passage of time, evolved into a strictly enforced pre-accession criterion.[9] Despite there being various clauses for harmonisation scattered throughout the EAs, the basic requirements were found in two Articles under a separate chapter heading. In the EC-Hungary EA,[10] these were found in Title V, Chapter III on "Approximation of Laws." According to Article 67 EA:

> The Contracting Parties recognise that the major precondition for Hungary's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community. Hungary shall act to ensure that future legislation is compatible with Community legislation as far as possible. [Emphasis supplied.]

The same provision in the EC-Poland EA[11] stated that Poland "shall use its best endeavours to ensure that future legislation is compatible with Community legislation." This so-called "endeavour clause"[12] became much

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8 A.F. Tatham, Restitution of charges and duties levied by the public administration in breach of European Community Law: a comparative analysis, (1994) 19 ***EL Rev***. 146; A.F. Tatham, Judicial review as effective protection of Community rights, (1995) 36 ***ZfRV*** 15.

9 Tatham (2009), chap. 8, 193, at 228-299.

10 Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part: OJ 1993 L 347 / 2.

11 Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part: OJ 1993 L 348 / 2.

12 Tatham (2009), at 344-345.

more precise and definite in Article 69 of the EAs later concluded with the Czech Republic[13] and Slovakia[14] wherein it provided that "its legislation will be gradually made compatible with that of the Community." The wording used in the Czech and Slovak EAs became the standard formula for all the remaining EAs and the new wave of SAAs with the Western Balkan States. The endeavour clause did not, per se, amount to a general obligation to harmonise within a defined period, merely underlining its importance in the integration process: it had to be read with other documents to be fully understood in a changing context from association to pre-accession to negotiation and with it the concomitant condition of EU membership to accept the entire ***acquis***.

BASIC ELEMENTS OF THE EUROPE AGREEMENTS ON ENFORCING EU JUDICIAL PRACTICE

Judicial capacity to apply the ***acquis*** is a core element in the preparation for accession and a central factor for the success of the enlargement process;[15] in fact, it has been a constant issue since the formulation of the Copenhagen criteria for membership of the EU.[16]

The Union had to propose a way to try and ensure conformity in judicial practice before accession while respecting the individual constitutional set-ups of the CEECs. In the absence of an equivalent to Article 4(3) TEU, the EU however could only make relatively weak demands on the CEECs – pending membership – to bring the practice of their courts into line with that of the ECJ and the General Court ("GC").[17] The EAs therefore made relatively little

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13 Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part: OJ 1994 L360/2.

14 Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part: OJ 1994 L357/2.

15 European Commission, European Commission, Communication, The Action Plans for administrative and judicial capacity, and the monitoring of commitments made by the negotiating countries in the accession negotiations: COM(2002) 256 final, at 3.

16 Tatham (2009), at 206-236.

17 Before the entry into force of the Lisbon Treaty, this institution was known as the Court of First Instance.

(implicit) recognition of the "harmonising" of third-State judicial practice to that of the EU, more particularly to the European courts' judicial practice.

There were, however, certain exceptions to this approach, viz. protection of intellectual property rights and competition law, in which CEEC courts were required to follow the practice of the European courts.

Intellectual property rights

In respect of the harmonisation to both European law and practice in the field of intellectual property, the 1991 EC-Hungary EA provided in Article 65 EA:[18] "Hungary shall continue to improve the protection of intellectual, industrial and commercial property rights in order to provide … a level of protection similar to that existing in the Community, including comparable means of enforcing such rights."

Article 113 EA stated that within the scope of the Agreement, each Party undertook to ensure that natural and legal persons of the other Party had access free of discrimination in relation to its own nationals "to the competent courts and administrative organs of the Community and Hungary to defend their individual rights and their property rights, including those concerning intellectual, industrial and commercial property."

In a series of Joint Declarations to the respective EAs, the EU and the associated State agreed that – for the purposes of the EA – the term "intellectual, industrial and commercial property" was to be given a similar meaning as in Article 30 EC (now Article 36 TFEU). It would therefore seem that third-State courts and authorities were to take account of the "substance" of European law in their rulings on the rights concerned,[19] irrespective of when the European IPR secondary legislation came into force or of when the ECJ ruling on the interpretation of the Article 30 EC (now Article 36 TFEU) wording occurred. In other words, future jurisprudential development by the ECJ could not be excluded which meant that CEEC courts would be bound to follow such case-law without any temporal limits.

But requesting accession State bodies to take an ECJ ruling "into account" – especially where this had not been translated into the domestic language and

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[18] Similar provisions were contained in all EAs.

[19] A. Evans, Voluntary Harmonisation in Integration between the European Community and Eastern Europe, (1997) 22 ***EL Rev***. 201, at 204.

might thus not have had any binding effect in that third State – ultimately proved insufficient to render a "level of protection similar to that existing in the Community." This was particularly true in respect of Regulations (only directly applicable in the EU) and Directives (also only of direct/indirect effect post accession) as interpreted by the ECJ. In truth, what was missing was a provision similar to Article 4(3) TEU on Union loyalty as mentioned above.

Competition law

In respect of European competition law, the EAs provided for use of the European courts' case-law in applying the relevant Treaty Articles. Again, according to the EC-Hungary EA, Article 62(1) EA, anti-competitive practices, abuse of dominant position and state aids were incompatible with the EA in so far as they affected trade between both parties. Article 62(2) EA provided: "Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles 85, 86 and 92 EC [now Articles 101, 102 and 107 TFEU]." In this way, the EU attempted to bind national courts and competition authorities in the CEECs to applying not only Treaty provisions but also their European judicial interpretation (both past and future European courts' decisions as there was, yet again, no time limit defined as to which judgments were to apply).

Comparing enforcement of EU judicial practice in the SAAs

With respect to judicial enforcement, the EU-Serbia SAA is largely cast in the mould of the EAs but with some important innovations. In this sense, the endeavour clause of Article 72(1) SAA has been revamped and includes express reference to implementation and enforcement:

The Parties recognise the importance of the approximation of the existing legislation in Serbia to that of the Community and of its effective implementation. Serbia shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community ***acquis***. Serbia shall ensure that existing and future legislation will be properly implemented and enforced.

Requirements similar to the EAs in the field of the protection of intellectual, industrial and commercial property rights are provided in Article 75(3) SAA but now includes "effective means of enforcing such rights" rather than the earlier "comparable means." The relevant competition provision, Article 73(2) SAA, follows those of the EAs but with some changes:

Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the EC Treaty [now Articles 101, 102, 106 and 107 TFEU] and interpretative instruments adopted by the Community institutions.

Thus while extending the field of application of ECJ case-law to Article 86 EC (now Article 106 TFEU) on commercial state monopolies, the SAA expressly permits the courts and competition authorities in Serbia to use such "interpretative instruments" as Notices from the European Commission related to the practice in particular matters of EU competition law.[20]

Under Article 126 SAA, it is provided that – within the scope of the SAA – natural and legal persons of the EU and Serbia shall be ensured access, free of discrimination in relation to their own nationals, to the other Party's competent courts and administrative organs so that they can defend their individual and property rights. Unlike the EC-Hungary EA, however, reference is not specifically made to the protection of intellectual property rights.

Despite these basic similarities between the SAA and the EAs, there are some novel aspects of the SAA concerning judicial enforcement which did not appear in the EAs. For example, Article 126 SAA is subsequently complemented by a sort of "Union loyalty-lite" clause in Article 129(1) SAA, according to which: "The Parties shall take any general or specific measures required to fulfil their obligations under this Agreement. They shall ensure that the objectives set out in this Agreement are attained." While this is only a somewhat pale reflection of the wording of Article 4(3) TEU (there is no prohibition on measures imperilling the attainment of the aims of the SAA), nevertheless it marks a distinct step forward in ensuring Serbian judicial and

[20] See, e.g., European Commission, Notice on co-operation within the Network of Competition Authorities: OJ 2004 C101/43, European Commission, Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC: OJ 2004 C101/54; European Commission, Notice on the handling of complaints by the Commission under Arts. 81 and 82 of the EC Treaty: OJ 2004 C101/65 European Commission, Notice on the handling of complaints by the Commission under Arts. 81 and 82 of the EC Treaty: OJ 2004 C101/65; and European Commission, Notice on informal guidance relating to novel questions concerning Arts. 81 and 82 of the EC Treaty that arise in individual cases (guidance letters): OJ 2004 C101/78.

administrative compliance with EU law (and the interpretations given it by the European courts in the intellectual property and competition sectors).

Although the precise impact of this clause in practice remains to be clarified in case-law, if taken together with Article 126 SAA and based on the practice of the ECJ discussed earlier, the Serbian courts are enjoined – under express provisions of an international treaty – to follow and apply the developments in European court rulings in intellectual property rights protection and in competition law, without any temporal limit. It is a much stronger requirement that under the EAs, European judicial decisions are not just mere tools for interpretation but, it could be argued, are now binding on the Serbian courts. In the light of such argument, the cases presented below must be cautiously viewed in the light of these new judicial enforcement provisions in the SAA.

QUESTIONING THE CONSTITUTIONALITY OF THE EAS

Introduction

The actual constitutionality of the EA was considered pre-ratification by the Slovene Constitutional Court and led to the State's first amendment to the 1991 Constitution, while its Hungarian counterpart considered the issue only post-ratification and entry into force. It is to this latter case that this work will now turn.

Hungary

The judgment of the Hungarian Constitutional Court in Dec. 30/1998 (VI.25) AB[21] highlighted the constitutional implications of applying EU law in the domestic system of an Associate State. Most CEECs had already accepted – without demur – the infringement of sovereignty entailed by the EA competition provisions solution and its concomitant implementing Association Council Decision,[22] but this was not the case with respect to

[21] ABH 1998, 220. A full discussion of the implications of the Decision for Hungary, in particular the Constitutional Court, can be found in J. Volkai, The Application of the Europe Agreement and European Law in Hungary: the Judgement of an Activist Constitutional Court on Activist Notions, ***Harvard Jean Monnet Working Paper*** No. 8/99:http://www.law.harvard.edu/Programs/JeanMonnet/papers/99/990801.html.

[22] For example, as required in EC-Hungary EA Art. 62(3) to implement paragraphs (1) and (2).

Hungary. The private petitioner in this case was able to challenge the EA and the Association Council Decision because the Court had already decided, in Dec. 4/1997 (I.22) AB,[23] that an individual had standing to seek constitutional review of the national legal rules which had implemented the European provisions into the Hungarian system.

Challenge to constitutionality of EA and related EC rules

Decision 30/1998 (VI.25) AB concerned a constitutional challenge of provisions of both the EA[24] (in the form of its transforming statute[25]) and Association Council Decision 2/96[26] (in the form of national implementing rules in an executive decree:[27] the "Implementing Rules" or "IR").[28] The relevant contested provisions were Article 62(2) EA (quoted earlier) together with (i) Article 1 IR which provided that anti-competitive practices that might affect trade between Hungary and the then EC were to be settled according to the principles in Article 62(1) and (2) EA for which purpose, these cases were to be dealt with on the Hungarian side by the Office of Economic Competition ("OEC"); and (ii) Article 6 IR, according to which, in applying Article 62 EA, the OEC was to ensure that the principles contained in the block exemption Regulations in force in the EC were applied in full.

In its ruling, the Constitutional Court held that, in execution of Article 62(1) and (2) EA under the national transforming statute, it was a constitutional requirement that the Hungarian law-applying authorities (i.e., the OEC) might not directly apply the application criteria referred to in Article 62(2) EA, but rejected the submission seeking the annulment of this latter provision. Nevertheless it did find Article 1(1) and (2) IR and Article 6 IR unconstitutional[29] on the grounds, inter alia, that a separate constitutional

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23 Dec. 4/1997 (I.22) AB: ABH [Alkotmánybíróság határozatok, Constitutional Court Decisions] 1997, 41.

24 Article 62 EA.

25 Act I of 1994: Magyar Közlöny [Hungarian (Official) Gazette] 1994/1, 1.

26 Decision 2/96 of the EC-Hungary Association Council: OJ 1996 L295/29.

27 Contained in Government Decree 230/1996 (XII.26) Korm.: Magyar Közlöny 1996/120.

28 A.F. Tatham, Constitutional Judiciary in Central Europe and the Europe Agreement: Decision 30/1998 (VI.25) AB of the Hungarian Constitutional Court (1999) 48 ***ICLQ*** 913.

29 The effect of its Decision was suspended until 31 December 1999. According to Act XXXII of 1989 on the Constitutional Court (as amended), s. 43(4), the Court may exercise its discretion and determine the date of the abrogation of the legal norm or its

authorisation would have been necessary to permit limitations of Hungarian sovereignty and accordingly allow the OEC to apply the European competition legal criteria (effectively foreign norms of a public law nature) in proceedings before it.

Reasoning

The main body of the Decision revolved around three, interlinked themes: (a) the mode of reference to EC competition criteria; (b) the temporal effect of such criteria; and (c) the territorial effect of such criteria and the constitutional requirement of democratic legitimation. These will now be dealt with in turn.

Mode of reference to EC competition criteria

According to Article 62(2) EA and Article 1 IR, the OEC had to take into account in proceedings before it the criteria deriving from application of Articles 85 and 86 EC (now Articles 101 and 102 TFEU). Yet it was the very fact that the relevant criteria appeared only by way of reference which prevented their application in Hungarian law.[30] Such reference was to internal legal rules and to the legal practice of internal fora (European Commission, GC, ECJ) of another subject of international law. Thus the European competition criteria were to be applied in OEC (and court) proceedings, without ratification and incorporation or transformation and promulgation in a domestic legal rule; this was necessary for the internal assertion of international treaties in accordance with the Hungarian Constitution, Article 7(1) of which provides: "The legal system of the Republic of Hungary shall accept the generally recognised rules of international law and shall further ensure the harmony between domestic law, and the obligations assumed under international law."

According to the Court, the second clause of Article 7(1) did not constitute a constitutional basis for the challenged provisions precisely because such regulation was based on reference alone,[31] nor did it amount to abstract and

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applicability in a given case in a different manner than that already described if justified by a particularly important interest of legal certainty or of the person who initiated the proceedings.

[30] Decision 30/1998 (VI.25) AB: ABH 1998, 220, Part IV.2-3.

[31] The matter would therefore have been different if the EA or IR had laid down the respective criteria. Such criteria in the ***acquis***, ECJ rulings as well as EC legal

general transformation under the first clause since the European competition criteria amounted neither to generally recognised rules of international law nor to ***ius cogens***.

Temporal effect of the competition criteria

The obligation undertaken in Article 62(2) EA, according to the Court,[32] (Part V.1), was not limited to the criteria for application already subsisting at the time of signature of the EA.[33] In other words the OEC was required to apply criteria emerging in European law and practice after the signing of the EA. The provisions of legal rules resulting in direct domestic assertion of EC criteria to be generated in the future were unconstitutional, since the source of such criteria was not the legitimate Hungarian public power vis-à-vis the Constitution or any of its organs. In other words, in the absence of the constitutional (parliamentary) basis for legitimation, post-EA conclusion European competition ***acquis*** could not be applied directly by the OEC (although indirect application was possible, as will be discussed later).

Territorial effect of the EC competition criteria and democratic legitimation

The Court considered these competition criteria as foreign law with respect to its application in Hungary which was not yet an EU Member State. The legal relationship of public law and authority, of which the sphere of the prohibition of unfair competition (like criminal law) formed a part, was directly connected to national sovereignty and belonged to the exclusive jurisdiction of the State. This exclusivity was intimately connected with territoriality – within its own jurisdiction, the State might dispose of its powers within the framework of its international relations. In the course of conducting such relations, there existed the natural consequence of limitations on sovereignty occasioned by undertaking international obligations. In this area the power of Parliament was not an unlimited power and had to be exercised in accordance with the Constitution.

On the issue of sovereignty, the main provisions were set out in Constitution Article 2(1), "Hungary shall be an independent, democratic state under the

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provisions, had already been incorporated to some extent in the Hungarian Competition Act, Act LVII of 1996 (Magyar Közlöny 1996/56, 3498).

[32] Decision 30/1998 (VI.25) AB: ABH 1998, 220, Part V.1.

[33] The EA and IR contained no provision limiting the temporal effect of the application of the EC competition criteria.

rule of law," while under Article 2(2), "all power is vested in the people, who exercise their sovereignty through elected representatives and directly." The Court noted that one of the requirements of a democratic state under the rule of law, based on the sovereignty of the people, was the fact that state power might only be exercised on the basis of democratic legitimation. All norms of public law enforceable against subjects of domestic law were to be based thereon. Exercise of power by the State was subject to such a requirement in respect of both internal and external activities. As a result, as with the present case, unless Parliament had express constitutional authorisation, it was constitutionally not entitled to infringe the principle of territoriality in the frame of an international treaty (the EA and IR) in a legal field, however narrow and strictly circumscribed, belonging to the exclusive jurisdiction of state supremacy.[34]

Democratic legitimation imposed the requirement (in respect of legal norms to be applied in Hungary) that their creation be attributable to the ultimate source of domestic public power. In the present case, it was clearly not possible to trace back to a Hungarian legal source the criteria referred to in Article 62(2) EA and the IR since a concrete and precise state undertaking in an international treaty was quite different from the present circumstance wherein some internal legal areas had been subjected to another system of public power (regardless of its limited sphere of application). A separate constitutional authorisation would have been necessary to permit limitations on Hungarian sovereignty and accordingly allow the OEC to apply the European competition legal criteria (effectively foreign norms of a public law nature) in proceedings before it.

Outcome

Decision 30/1998 (VI.25) AB was read in a way that obliged the Government/Parliament to turn the relevant European competition acquis into domestic sources of law. The creation of a list of competition acquis was mooted in this respect which could then be translated and published in the

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[34] Decision 30/1998 (VI.25) AB: ABH 1998, 220, Part V.2-3. On this point, in support of its contention, the Court cited to Case C-327/91 ***France v. Commission*** [1994] ECR I-3641 at 3678, according to which if the Commission enters into an international agreement with a non-Member State, then it will be reviewable if it produces legal effects. It is to be noted that this is perhaps the first citation to an ECJ judgment made by a Hungarian judicial body.

Magyar Közlöny (the Hungarian Official Gazette), thereby becoming sources of law in the Hungarian system and rendering them applicable by the OEC and ultimately domestic courts. The undertaking of such a task was daunting.[35] The ultimate solution was to replace the 1996 Association Council Decision with another, Association Council Decision 1/2002,[36] implemented into the Hungarian system by a 2002 statute[37] which, inter alia, authorised[38] the government to promulgate by decree, in a specific order, the official Hungarian translation of the European competition norms listed in the Annex (both Regulations and Commission Notices); to act concerning the review of the Annex; and to promulgate by decree, according to the amendments, the official Hungarian translation of the new European competition norms entered in the Annex.

The experience of Hungary in this respect is a salutary lesson in accepting the individuality of constitutional systems and their reaction to the conclusion and enforcement within their territories of association agreements with the EU and related rules. The provisions of the 2002 Act may have been one reason why the Commission Notices were included in the EU-Serbia SAA as an expressly-recognised instrument for interpretation.

Slovenia

Hungary was not alone in experiencing a constitutional moment with respect to its EA. Slovenia[39] too was faced with such an issue, in a Constitutional Court ruling related to the foreign ownership of property and the EA, Case Rm-1/97.[40] The then 1991 Constitution, Article 68 provided that: "Foreigners may not acquire title to land...." However, according to the EA with

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35 However, an attempt at addressing this problem was previously made in the drawing up of 1996 Competition Act which, in certain provisions, amounted to an incorporation of the ratios of some of the leading ECJ judgments in the competition field: A.F. Tatham, European Community Law Harmonization in Hungary, (1997) 4 ***MJ*** 249, at 262-263 and at 281-282.

36 OJ 2002 L145/16.

37 Act X of 2002: Magyar Közlöny 2002/34/I, 3498.

38 Act X of 2002, section 4.

39 See generally, M. Pogačnik, M. Starman & P. Vehar, Slovenia, A.E. Kellermann et al., ***The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre-) Candidate Countries: Hopes and Fears***, T.M.C. Asser Press, The Hague (2006), 179-187.

40 Opinion of Slovene Constitutional Court, 5 June 1997, Case Rm-1/97: Uradni list RS [Official Gazette of the Republic of Slovenia] No. 40/97. Available at: <http://www.us-rs-si>.

Slovenia,[41] especially Article 45(7c) EA and Annex XIII EA, the Government had committed itself to take the necessary measures: (a) to allow EU citizens and braches of EU companies – on a reciprocal and non-discriminatory basis – the right to purchase property in Slovenia by the end of the fourth year from the entry into force of the EA, and (b) to grant EU citizens (having permanently resided on the territory of Slovenia for three years), on a reciprocal basis, the right to purchase property from the entry into force of the EA. The Government, in the process of EA ratification, sought the opinion of the Constitutional Court as to the constitutionality of the Agreement.

In its Opinion, the Court declared Article 45(7c) EA and parts of Annex XIII EA unconstitutional and held that the Government could not approve any such commitments on behalf of Slovenia under international law as they would contravene the Constitution. Such commitments would be unconstitutional if, by the coming into force of the EA, the EA created directly applicable unconstitutional norms in domestic law, or if it bound the State to adopt any such instrument of domestic law as would conflict with the Constitution. Nevertheless, the Court did indicate that the possible solution would be to adopt a constitutional amendment.

This solution was followed by the Government, leading to the first amendment of the 1991 Constitution by changing Article 68 to read: "(1) Foreigners may acquire ownership rights to real estate under conditions provided by law or if so provided by a treaty ratified by the National Assembly, under the condition of reciprocity. (2) Such law and treaty from the preceding paragraph shall be adopted by the National Assembly by a two-thirds majority vote of all deputies."

In its judgment, the Constitutional Court clearly treated the EA as an international treaty but made a number of points in this respect:[42]

The fulfilment of an international agreement can be realised already by the fact that its provisions pass directly into the internal legal system of the State at the time of the coming into force of such agreement. Such fulfilment takes place in the case if an international agreement has been ratified in accordance

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41 Europe Agreement establishing an association between the European Communities and their Member States, acting within the framework of the European Union, of the one part, and the Republic of Slovenia, of the other part: OJ 1999 L51/3.

42 Opinion of Slovene Constitutional Court, 5 June 1997, Case Rm-1/97, at para. 20.

with the internal legal system of the Republic of Slovenia and if its provisions are, in the nature of the matter, directly applicable (self-executing treaties), for they regulate the rights and obligations of natural and legal persons.

However, if the provisions are not directly applicable, it is necessary, with a view to fulfilling contractual obligations, for appropriate measures to be taken by internal law – the adopting of appropriate legal instruments. From the viewpoint of international law, it is essential that the State fulfil an international obligation, but it is not of importance in what way such fulfilment has been effected (through direct application of provisions of the international agreement in internal law or by the adoption of the necessary instruments of internal law); the manner of fulfilment would only be of relevance to international law in the case if this is expressly provided by the international agreement.

The Court's Opinion in this respect allowed for (1) the possible recognition of certain provisions of the EA having some form of direct applicability;[43] and (2) the need to enact national implementing measures in order to give the EA effect in the domestic legal system.

A further point of interest was raised by in the concurring opinions of Jambrek and Ude, JJ., was the fact that they touched upon the concept of incorporation of the competition ***acquis*** before EU membership. Referring expressly to the Hungarian Constitutional Court, Dec. 4/1997 (I.22) AB, Jambrek, J. stated that the EA transferred sovereignty from Slovenian authorities by forcing the Slovene courts to apply the law and legal principles of the EC, including ECJ case-law. In his view, this type of incorporation would legally mean already being in the same position as the EU Member States but only on "the passive side," rendering this unconstitutional.

[43] This point was subsequently affirmed, by argument ***a contrario***, in Opinion of the Constitutional Court, 21 November 2000, Case U-I-283/00, ***Uradni list RS***, No. 86/2000.

IMPACT OF EU LAW THROUGH CEEC PRE-ACCESSION CONSTITUTIONAL COURT PRACTICE

Introduction

CEEC constitutional courts, when addressing the issue of the enforcement of EU law before accession, generally considered the judiciary to be under a duty to interpret national law – if possible to do so without infringing the Constitution – to comply with the provisions of EU law. Thus the courts viewed EU law, as transmitted through the EA, not to be a binding legal source in their national systems in the lead up to membership but rather as a tool for interpretation of domestic law.

Hungary

Despite the import of its judgment in Dec. 30/1998 (VI.25) AB,[44] the Hungarian Constitutional Court made further, more positive, remarks concerning the use of European law as an instrument of interpretation by domestic courts and law-applying authorities. It considered that matters falling within the remit of the EA and coming before the OEC were subject to a "double ruling": namely they were to be judged on the basis of the Article 62(2) EA criteria while simultaneously the substantive laws of the parties were to be applied. The IR provision on the application of either party's own substantive law did not mean that the OEC was to apply exclusively the rules of Hungarian competition law. The relevant European legal criteria were also "leading" for the OEC as criteria for interpreting its own domestic competition rules.[45]

On that basis, it was clear that the criteria deriving from the judicial application of the rules included in (the former) Articles 85, 86 and 92 EC (now Articles 101, 102 and 107 TFEU) – as stated in Article 62(3) EA – were not recognised as sources of law in Hungary. However, the Court expressly said that such criteria might be used as tools of interpretation provided that such interpretation did not breach Article 2(1) of the Constitution concerning a democratic state under the rule of law:

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[44] Decision 30/1998 (VI.25) AB: ABH 1998, 220.

[45] The Court supported its argument on "double ruling" by express reference to the XXIV th Report on Competition Policy: COM(95) 142 final, art. 402, at 284.

Though the Office of Economic Competition ["OEC"] does not apply Article 62(1) and (2) EA because of the absence of direct effect of such provisions, it does apply the substantive rules of Hungarian competition law – also containing prohibitions and legal consequences – however it has to determine their content to be applied in a way that the relevant legal criteria of the Community be properly asserted in the domestic legal practice. Thus the relevant legal criteria of the Community determine indirectly the content of the decisions of the OEC taken against the enterprises (private legal subjects) subject to the OEC procedure.

….[T]he OEC is obliged to take into consideration the legal criteria of the Community referred to in Article 62(2) EA during judgment of concrete cases. The Constitutional Court does not see any possibility for an interpretation to the contrary. As regards the constitutional analysis, compared to this the fact that the relevant legal criteria of the Community serve only as directives for interpretation to the OEC procedure is only of secondary importance.

Since the OEC had to determine the content of Hungarian competition law to be applied in a manner that allowed the proper assertion in domestic practice of the relevant European legal criteria, it was in effect enjoined to apply the Union criteria indirectly. The Court's arguments on this point, embodying an opinion binding on the OEC, went some way to ensure that European competition rules were to have an important bearing in their field of operation,[46] this possibility perhaps offering the best guarantee of faithful (indirect) application of European competition law internally, pending accession.[47] This opinion of the Hungarian Court was not an isolated one. Similar views, on areas beyond intellectual property and competition, were expressed by other superior courts in the CEECs.

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[46] Such argument had previously been put by the present author in an Advisory Opinion to the Constitutional Court in this case, in May 1997.

[47] However such interpretation possessed outside boundaries namely that the principle of favor conventionis could be asserted only in so far as it did not infringe the Constitution. Were the proper interpretation of the international undertaking to result in infringement of Article 2 of the Constitution (democratic state under the rule of law), the Court asserted, the harmony required by Article 7(1) of the Constitution would not be established.

Poland

In the pre-accession period, academic literature maintained the position that Polish courts were under a duty to interpret domestic law in a manner as favourable as possible to EU law.[48] Indeed, it was presumed that the national court should choose the European meaning of a domestic provision from among the possible meanings available according to the relevant rules of interpretation:[49] such academic position, conforming to the ***Marleasing*** jurisprudence,[50] was confirmed by the case-law of the Constitutional Tribunal.

The Tribunal's approach before accession was to use EU law and ECJ rulings – by means of Poland's EA[51] – as a tool of interpretation of national norms. In Dec. K 15/97,[52] e.g., the Ombudsman petitioned the Tribunal, seeking review of the constitutionality of section 44(2)(1) of the 1996 Civil Service Act[53] which referred the determination of retirement age of female civil servants to the general legal provisions concerning retirement pensions. Thus, it was submitted, by implication the possibility of compulsory retirement of a female civil servant at 60, i.e., five years before a male one. In challenging this as an infringement on the right of equality between men and women under Article 78 of the then (1952, amended) Constitution,[54] the Ombudsman used in support a line of judgments of the ECJ.

The Constitutional Tribunal, ruling in favour of the Ombudsman's petition, held that in section 44(2)(1) the differentiation in compulsory retirement ages amounted to sex discrimination contrary to the then Constitution Articles 67(2) and 78(1) and (2). It noted that Article 119 EC (now Article 157 TFEU)

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48 On this issue, see generally K. Kowalik-Bańczyk, Prowspólnotowa wykładnia prawa polskiego, ***Europejski Przegląd Sądowy grudzień*** 2005, 9-18.

49 S. Biernat, Wykładnia prawa krajowego zgodnie z prawem Wspólnot Europejskich [Interpretation of national law in compliance with EC law], in C. Mik (ed.), ***Implementacja prawa integracji europejskiej w krajowych porządkach prawnych*** [Implementation of European law in the internal legal systems], TNOiK, Toruń (1998), at 123.

50 Case C-106/89 Marleasing SA v. La Comercial Internacional de Alimentacion SA [1990] ECR I-4135.

51 Note 10 above.

52 Dec. K 15/97, 29 September 1997: OTK ZU 1997/3-4, Item 37.

53 Act of 5 July 1996, Dz. U. No. 89, Item 402.

54 Now to be found in Art. 33 of the current Constitution dating from 1997.

had fundamental importance for the formulation of the principle of equality of men and women and had been further developed in several Directives, the most important being the then Directive 76/207/EEC on equal treatment.[55] The Tribunal continued that, in the light of the Equal Treatment Directive, notice had to be taken of the ruling of the ECJ in Marshall[56] where it had stated: "Article 5 of the Directive must be interpreted as meaning that a general policy concerning dismissal involving the dismissal of a woman solely because she has attained the qualifying age for a state pension, which age is different under national legislation for men and women, constitutes discrimination on grounds of sex, contrary to that Directive."

Then the Tribunal further remarked that the ECJ had assumed a similar standpoint, in a ruling of the same date, Beets.[57] It thereafter proceeded to balance the clear lack of domestic effect of EU law prior to accession with the requirements of the EA:

Of course, [EU] law has no binding force in Poland. The Constitutional Tribunal wishes, however, to emphasise the provisions of Article 68 and Article 69 of the [EC-Poland EA] …. Poland is thereby obliged to use "its best endeavours to ensure that future legislation is compatible with Community legislation" and this obligation is referred to, for example, provisions regulating "protection of workers at the workplace." The Constitutional Tribunal holds that the obligation to ensure compatibility of legislation (borne, above all, by the Parliament and the Government) also results in the obligation to interpret existing legislation in such a way as to ensure the greatest possible degree of such compatibility. [Emphasis supplied.]

It is evident that the Constitutional Tribunal considered it as incumbent on domestic law-applying authorities to interpret national law as far as possible in a Euro-conform manner. The Tribunal, like its Hungarian counterpart, would accordingly not countenance an interpretation that would be

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[55] Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions: OJ 1976 L39/40. This, with other Directives in the discrimination field, has now been consolidated into Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation: OJ 2006 L204/23.

[56] Case 152/84 ***Marshall v. Southampton and South-West Hampshire Area Health Authority*** [1986] ECR 723.

[57] Case 262/84 ***Beets-Proper v. Van Lanschot Bankiers*** [1986] ECR 773.

unconstitutional: such ***contra legem*** limits were re-emphasised in post-accession cases.[58] Decision K 15/97 thus implied the duty to apply an interpretation ***infra legem*** (explanatory function) but did not impose (although permitted) an interpretation ***praeter legem*** (supplementary function) and prohibited an interpretation ***contra legem*** (specifically the Constitution and its principles):[59] this duty of consistent interpretation was followed in later judgments.[60]

In the lead up to accession – in respect of the particular case of Polish courts being bound to the interpretation of EU law in rulings of the ECJ – the position of Polish legal thinking was divided between those who felt that an express rule ordering the courts to respect such ECJ interpretation was needed[61] and those who considered them as part of the ***acquis*** and thus introduction of such an express requirement into Polish law was unnecessary.[62] The absence of any legal changes confirmed the latter assumption and this was affirmed in Constitutional Tribunal case-law in the year before accession.

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[58] The need to interpret national law in a Euro-conform manner (within the field of sex discrimination) also arose in Dec. K 27/99 (28 March 2000: OTK ZU 2000/2, Item 62); Dec. K 15/99 (13 June 2000: OTK ZU 2000/5, Item 137) and Dec. K 35/99 (5 December 2000: OTK ZU 2000/8, Item 295). Moreover, the Tribunal did not see itself limited to merely legal sources from the EU in support of its arguments: in Dec. K. 15/98 (11 April 2000: OTK ZU 2000/3, Item 86), it even made reference to the 1997 Commission Opinion on Poland's application to the EU.

[59] C. Mik & M. Górka, The Polish Courts as Courts of the European Union's Law, in B. Banaszkiewicz et al., 1 Jahr EU Mitgliedschaft: Erste Bilanz aus der Sicht der polnischen Höchstgerichte, ***EIF Working Paper*** No. 15, Institut für Europäische Integrationsforschung, Österreichische Akademie der Wissenschaften, Wien (2005), 33, at 41: <http://www.eif.oeaw.ac.at/downloads/workingpapers/wp15.pdf>. 29 January 2011.

[60] For example, Dec. K 12/00, 24 October 2000: OTK 2000/7, Item 255.

[61] C. Mik, Zasady ustrojowe europejskiego prawa wspólnotowego a polski porządek konstytucyjny, 1998/1 ***Państwo i Prawo*** 33, at 37.

[62] N. Półtorak, Zmiany w postępowaniu przed sądami polskimi jako konsekwencja Polski do Unii Europejskiej [Changes in Polish court procedures as a consequence of Polish EU accession], in C. Mik (ed.), ***Polska w Unii Europejskiej. Perspektywy, warunki, szanse i zagrożenia*** [Poland in the EU: Perspectives, conditions, chances and dangers], TNOiK, Toruń (1997), 270; J. Skrzydło, Sędzia polski wobec perspektywy członkostwa Polski w Unii Europejskiej [Polish judge considering the perspective of Poland's EU membership] 1996/11 ***Państwo i Prawo*** 35ff.

The Tribunal gradually transformed the duty of consistent interpretation into the principle of a friendly approach to European law. In Dec. K 2/02,[63] the Constitutional Tribunal was seized of a case concerning the advertisement and promotion of alcoholic drinks. In the judgment, the Tribunal invoked the ECJ rulings in von ***Colson***[64] and ***Marleasing***[65] and observed that, although in the pre-accession period, Poland did not have the legal obligation to apply the principles of interpretation derived from the ***acquis***, it nevertheless stressed that the duty of consistent interpretation could be considered as a practical and the least expensive instrument for law harmonisation. Such a duty was, however, subject to two preconditions: (1) the Polish law in question could not expressly contradict the EU rule as a result of political and legislative choices made in the pre-accession period; and (2) some gap existed to allow for interpretative flexibility.[66]

The evolution of this approach into a constitutional principle occurred several months later in Dec. K 11/03[67] on the constitutionality of the Act on National Referenda. In its reasoning, the Constitutional Tribunal stated that the interpretation of binding law – whether constitutional provisions or any domestic norms – should take account of the constitutional principle of a friendly approach to European integration and co-operation between States. According to the Tribunal, the basis for this principle was the Preamble (e.g., "Aware of the need for co-operation with all countries for the good of the Human Family") as well as Article 9 of the 1997 Constitution: "The Republic of Poland shall respect international law binding upon it." The Constitutional Tribunal therefore posited the position that it would be constitutionally correct and preferable to interpret the law in such a way that it would contribute to the realisation of this principle.

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63 Dec. K 2/02, 28 January 2003: OTK ZU 2003/1A, Item 4. See also Dec. K 33/03, 21 April 2004: OTK ZU 2004/4A, Item 31.

64 Case 14/83 ***Von Colson v. Land Nordrhein Westfalen*** [1984] ECR 1891.

65 Case C-106/89 ***Marleasing SA v. La Comercial Internacional de Alimentacion SA*** [1990] ECR I-4135.

66 Despite its apparent convenience and attractiveness, consistent interpretation was counselled only as a supplementary method of European law implementation and not as a substitute form other legislative activities aimed at European law harmonisation in Poland: P. Biernat, 'Europejskie' orzecznictwo sądów polskich przed przystąpieniem do Unii Europejskiej, 2005 ***Przegląd Sądowy***, No. 2, 7.

67 Dec. K 11/03, 27 May 2003: OTK ZU 2003/5A, Item 43.

On the eve of membership, the Constitutional Tribunal revised its understanding of the constitutional basis for this principle. Decision K 33/03[68] concerned certain provisions of the 2003 Biofuels Act which aimed at inducing producers and distributors of liquid fuels to manufacture and offer petrol and diesel containing additives of biological origin (biofuels). The Ombudsman challenged three particular provisions of the Act[69] which, he considered, amounted to substantial restrictions on economic freedom or were unfavourable from the perspective of consumer protection. In applying the challenged provisions to all manufacturers (or sellers) – not just to national but also to foreign (EU) ones – the national legislator would be imposing a measure having equivalent effect to a quantitative restriction, prohibited by Article 28 EC (now Article 34 TFEU), and would be unable to justify it under Article 30 EC (now Article 36 TFEU), in the light of cited ECJ case-law on the subject.[70]

In making its ruling, the Constitutional Tribunal observed that the principle of interpreting national law in a manner favourable to European law, based on Constitution Article 91(1), related in particular to interpretation of the constitutional basis of review performed by the Constitutional Tribunal – which in this case were the principles of economic freedom and consumer protection.

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68 Dec. K 33/03, 21 April 2004: OTK ZU 2004/4A, Item 31.

69 The three provisions in question were: (a) section 12(1) which made it obligatory for manufacturers to market in any given year the amount of biocomponents specified in a Council of Ministers' Decree issued annually under section 12(6). Biocomponents could be introduced in three different forms: as a component of "normal" liquid fuels; as a component of liquid bio-fuels; or as pure engine fuel (pure bio-ethanol, pure VOME bio-diesel); (b) section 14(1) which stated that "normal" liquid fuels with bio-component additives could be sold through unmarked pumps. The obligation to sell from separate pumps, marked in such a manner so as to enable identification of the bio-component content, related only to bio-fuels in the strict sense (section 14(2) which was not challenged in the present proceedings) and (c) section 17(1)(3) which prescribed an administrative fiscal penalty for undertakings failing to market bio-components or marketing them in lower quantities than those prescribed by the aforementioned Decree. The penalty would amount to 50% of the value of marketed liquid fuels, bio-fuels and pure bio-components.

70 Referring basically to ***Cassis de Dijon*** (Case 120/78 ***Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein*** [1979] ECR 649) and ***Keck*** (Joined Cases C-267 and C-268/91 Criminal proceedings against ***Keck and Mithouard*** [1993] ECR I-6097).

Estonia

Constitutional regard for European law also came in a 1998 case concerning equality of treatment of seamen, appealed to the Constitutional Review Chamber of the Estonian Supreme Court. In a concurring opinion to the Chamber's Decision, the Chairman[71] noted the ratification of the EC-Estonia EA[72] and its requirements to harmonise legislation. The EU had been built on the four freedoms and observed that Article 48(2) EEC (now Article 45(2) TFEU) sought to abolish any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. He continued: "One of the general principles of European law is the principle of equal treatment. It is allowed to impose restrictions on free movement of persons but only if it is triggered by 'real and serious threat to a state's policy'." For the Chairman, these were the legal-political landmarks that Estonia had to be guided by in further legal regulation of movement of labour force, including seafarers: judges and other law-applying agencies were therefore clearly bound to or at least had to have close regard to the principles of European law in cases before them.

Czech Republic

The existence of a "Euro-friendly" interpretation of national law within the competition sector was evinced in the decision of the Czech Constitutional Court in the Škoda automobilova a.s. case[73] on abuse of dominant position. The plaintiff car manufacturer had originally challenged the decision of the Czech Competition Authority on the grounds that EU law was not, at that

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[71] Decision of the Constitutional Review Chamber of the Supreme Court of Estonia of 27 May 1998, No. 3-4-1-4-98, concurring opinion of Chairman of the Chamber Rait Maruste: <http://www.nc.ee/?id=461>. 2 February 2011.

[72] Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part: OJ 1998 L 68/3.

[73] Czech Constitutional Court, 29 May 1997, Case III, ÚS 31/97: ***Sbírku nálezů a usneseni Ústavního soudu*** [Constitutional Court Reports], Vol. 8, No. 66, 149. See I. Milinkova, Competition Law and Policy in the Czech Republic, Czech Office for the Protection of Economic Competition, ***Paper presented to Budapest Conference***, 9-11 October 1998, Budapest, at 4; and M. Bobek & Z. Kühn, What about that 'incoming tide'? The Application of EU Law in the Czech Republic, in A. Łazowski (ed.), ***The Application of EU Law in the New Member States – Brave New World***, TMC Asser Press, The Hague (2010), chap. 10, 357, at 358-359.

time, a binding source of law in the national legal system and that it therefore could not be taken into account in the interpretation of national law. On appeal, the High Court (in emphasising the international links between domestic competition laws) stated:[74]

For that matter [the 1991 Czech Competition Act] received the basic ideas of the Treaty of Rome, particularly already mentioned Articles 85, 86 and 92 [now Articles 101, 102 and 107 TFEU]; this was from the perspective of harmonisation of the legal systems of the European Communities and the Czech Republic an absolute necessity.

The High Court held that it did not amount to an error in law for a national authority to interpret Czech competition law consistently with ECJ case-law and Commission Decisions. In the same case, the Constitutional Court was seised of a constitutional complaint from the car manufacturer: nevertheless, it affirmed the High Court's approach and maintained that both the EC Treaty and the EU Treaty derived from the same values and principles of Czech constitutional law. As a result, the interpretation of European competition provisions by EU institutions (whether the ECJ, General Court or Commission) was valuable for interpretation of the corresponding Czech provisions.

The Court thus ruled on the relationship between the Czech and the EU decision-making processes by declaring the relevance of European rules and judicial and institutional practice to the facts of the case, using them as interpretative tools for domestic law. The supporting arguments pointed, in part, to the insufficiency of Czech concepts to protect economic competition and the manifested Czech judicial determination to apply European rules and practice.

In a subsequent decision from 2001,[75] the Czech Constitutional Court was petitioned by a group of MPs, seeking annulment of a government decree on setting milk production quotas, which decree, inter alia, had harmonised domestic law to the relevant EC Regulation. At the oral hearing, the petitioners expressed the opinion that Community law was not relevant to the Court in evaluating unconstitutionality, as the Czech Republic was not an EU Member State. The Court strongly objected to this proposition as being

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74 High Court (Olomouc), 14 November 1996: (1997) 5(9) ***Právní rozhledy*** 484.

75 ***Milk Quota case***, Czech Const. Ct., 16 October 2001, Case Pl. ÚS 5/01: No. 410/2001 Coll.

oversimplified and sketchy and stated in its ruling[76] that one of the sources of primary Community law was the general legal principles which the ECJ took from the constitutional traditions common to EU Member States. General legal principles were contained in the concepts of a state based on the rule of law, including fundamental human rights and freedoms and fair proceedings within that framework. Similarly, the Czech Court had repeatedly applied general legal principles which were not expressly contained in legal rules, but were applied in European legal culture (e.g., the principle of reasonableness). The Court thus viewed itself as having subscribed to European legal culture and its constitutional traditions. It continued: "Thus, primary Community law is not foreign to the Constitutional Court, but to a wide degree permeates – particularly in the form of general legal principles of European law – its own decision making. To that extent it is also relevant to the Constitutional Court's decision making."

In fact, in order to emphasise its openness to EU law, the Court later referred[77] to support its reasoning to the ECJ case of ***Hauer***[78] – a case which had concerned the issue of limiting the fundamental right to property in connection with the application of community regulations on agricultural production. Use of ECJ rulings in its own decision-making was repeated by the Czech Court in the Sugar Quota II case, in which it acknowledged:[79]

[O]ne can refer to the case law of the European Court of Justice only peripherally, and in the form of further development of the Constitutional Court's arguments in [the Milk Quota case]. In its ruling on the complaint ***Metallurgiki Halyps v. Commission*** (258/81), the European Court of Justice emphasised that Community restrictions on steel production in the public interest, although they can endanger the profitability of an enterprise, do not represent any violation of the right to own property.

From these cases, it is possible to see that the Czech Constitutional Court accordingly took its own "European-friendly approach" based on the similarities between EU and domestic constitutional law, a matter that has

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[76] Case Pl. ÚS 5/01: No. 410/2001 Coll., Part IV.
[77] Case Pl. ÚS 5/01: No. 410/2001 Coll., Part VII.
[78] Case 44/79 ***Hauer v. Land Rheinland-Pfalz*** [1979] ECR 3727.
[79] ***Sugar Quota II case***, Czech. Const. Ct., 30 October 2002, Case Pl. ÚS 39/01: No. 499/2002 Coll., Part VI.

been emphasised more recently in respect of national constitutional review of the Lisbon Treaty.[80]

Conclusion

The impact of implementing and enforcing EU law is crucial on the domestic legal system of a (potential) candidate country like Serbia. Judicial capacity concerns not only an independent judiciary, trained and able to apply EU law and protect before them rights derived from it[81] but also the existence of an efficient functioning court system (avoidance of excessive delays, intra-system computerization, and elimination of case backlogs in specific courts), with adequate resources and professional staff.[82]

For such reasons and as already outlined in this work, it may be necessary to consider the consolidation and deepening of the legal foundations of Serbia-EU relations by adding some judicial dynamic to the development of these links. In the SAA, unlike the EAs, the provision similar to Article 4(3) TEU in Article 129(1) SAA, at the very least could engender a general obligation on Serbian courts to interpret domestic harmonised law (as far as practicable) in concordance with that of EU law and the interpretations given to it by the ECJ and GC. Such interpretations become even more authoritative then through the express provisions of the SAA on intellectual property rights and competition law, despite the unlimited temporal nature of the requirement: in other words, Serbian courts have to match their interpretations to future and continuing developments in the European courts' decision-making. No doubt, were the Serbian Constitutional Court to receive a petition containing a germ of SAA-EU law in it, it might feel able to follow its CEEC counterparts

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80 German Federal Const. Ct., Lisbon, 30 Juni 2009, 2 BvE 2/08 and 5/08, and 2 BvR 1010/08, 1022/08, 1259/08 and 182/09: BVerfGE 123, 267; [2010] 2 ***CMLR*** 712; Hungarian Const. Ct., Dec. 143/2010 (VII.14) AB: ABK 2010. július-augusztus, 872; Polish Const. Trib., Dec. K 32/09, 24 November 2010: OTK ZU 2010/9A, Item 108; and Czech Const. Ct., 26 November 2008: Case No. Pl. ÚS 19/08 and 3 November 2009: Case No. Pl. ÚS 99/09.

81 Tatham (2009), at 375-397.

82 J.H. Anderson and C.W. Gray, Transforming Judicial Systems in Europe and Central Asia, World Bank, Washington, DC (2007), at 347:

<siteresources.worldbank.org/EXTECAREGTOPJUDREF/Resources/ABCDEF.pdf>. 12 February 2011. This paper updated J.H. Anderson, et al., ***Judicial Systems in Transition Economies: Assessing the Past, Looking to the Future***, World Bank, Washington, DC (2005).

and rule on a "Euro-friendly" interpretation of national law, before accession, using as a basis for such approach Serbia's "commitment to European principles and values" from Article 1 of the 2006 Constitution and from Article 16(2), "ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly."

Nevertheless, as the Polish Constitutional Tribunal considered, there would be limits to this type of interpretation, viz., Article 194(2) of the Serbian Constitution (like Article 8 of the Polish Constitution) provides: "The Constitution shall be the supreme legal act of the Republic of Serbia." In addition, it might be possible to follow the example of the Hungarian Constitutional Court and its understanding of the relationship between a European interpretation of national law and the limits on such interpretation found under Constitution Article 2 on a democratic state under the rule of law and popular sovereignty. These limits to a Euro-friendly interpretation of national law by the Serbian courts could be based on the 2006 Constitution Articles 1-3.

It might also be that the Serbian Constitutional Court would be called upon to rule on the constitutionality of provisions of the SAA, under Constitution Article 167(2), for which clearly Constitution Article 16(3) would form a basis: "Ratified international treaties must be in accordance with the Constitution." To what extent might the SAA be unconstitutional? At least one problematic issue has been avoided: unlike Slovenia, the 2006 Constitution (Article 85) allows foreign natural and legal entities to obtain real property, according to the law or international treaty.

In fact, the Serbian Constitution also appears to pre-empt concerns of equal treatment of EU natural or legal persons under the SAA. In dealing with the status of foreign nationals, Article 17 provides: "Pursuant to international treaties, foreign nationals in the Republic of Serbia shall have all rights guaranteed by the Constitution and law with the exception of rights to which only the citizens of the Republic of Serbia are entitled under the Constitution and law." Such approach is reinforced by the equality clause, in Article 18, which prohibits, inter alia, direct and indirect discrimination on grounds of national origin and proclaims equal rights to legal protection which latter right is reinforced by Article 36 that adds the right to a legal remedy. These provisions together reflect the contents of Article 126 SAA.

With regard to competition, the Serbian Constitution under Article 84(2) has gone so far as to provide express prohibition of acts that are contrary to the law and restrict free competition by creating or abusing a monopolistic or

dominant status, and under Article 84(4) ensures equal treatment between Serbian and foreign persons, whether legal or natural, on the market. These provisions of themselves might not be sufficient to alleviate the possibility of a Hungarian-style scenario occurring in respect of the application of the EU competition acquis, as applied and developed by the Commission and the European Courts, through Article 73(2) SAA. But this provision and those in Articles 72(1), 126 and 129(1) SAA (the latter being a so-called "Union loyalty-lite" clause) should be further read with the 2006 Constitution which provides under Article 142(2) that courts shall perform their duties in accordance inter alia with the Constitution, law and ratified international contracts, and under Article 145(2) that their decisions are based on the Constitution and law, ratified international treaty, and regulation passed on the basis of the law. It could be argued, at least from an EU law perspective, that the Serbian courts are bound (in competition cases) to use Commission Notices and Decisions and the rulings of the European Courts, whenever decided, in determining cases before them.

With the coming into force of the SAA, the next few years will consequently prove to be vital in ensuring the protection of rights derived from EU law in Serbia, particularly though not exclusively those in the field of intellectual property rights and competition.

Revija za evropsko pravo: XIII (2011) 1.

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UDK: 341. 241.8 (4)

pp. 35-48

THE CONCEPT AND FACES OF THE PRINCIPLE DIRECT EFFECT OF EUROPEAN COMMUNITY LAW

Abstract

The aim of this paper is to describe and elaborate a concept of direct effect as the general concept in EC/EU law. To achieve that, it is necessary to make the analysis of some scholar's opinions and ECJ's jurisprudence. First, I will try to explain the concept of direct effect and the direct applicability in general in order to find different meanings of a direct effect. Then, I will present and explain some meanings or features of direct effect and refer to the practical importance of direct effect.

Key words: community law, EU law, direct effect, direct applicability, legal protection, European Court of Justice.

CONCEPT

1. Direct effect and/or direct application?

Having in mind that provisions that account for Community law/EU law are initially established beyond the member states, their enforcement in member states depends upon understanding and clarification of two questions. Firstly, the member states should accept and recognize EU law as integral

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part of their internal legal order and secondly, national courts should approve their application and provide direct legal protection of subjective rights to the community subjects. Within the community law/EU law, the first issue has been resolved in framework and by the principle of direct application, while the second issue has been set on by the principle of direct effect.[1] However, despite the fact that both principles have been accepted as basic principles in legal theory and practice of the European Court of Justice (ECJ), now the Court of Justice of the European Union, there is no uniform position with regard to their interrelation, nor about the reasons why the Court of Justice does not recognize direct horizontal effect of the directives, which makes this question still up to date.[2]

With regard to the relationships between the concepts direct application and direct effect, there are some scholars who consider the concepts direct effect and direct applicability to be interchangeable,[3] while others emphasize that those concepts must be carefully distinguished.[4] A third group recognizes this distinction but without dramatization.[5] There are authors who consider that direct applicability is concerned with the process of incorporation of the Community law in national legal systems, but primarily regulations.[6]

The reasons for different perceptions of those concepts should be sought in the specific nature of community law whose legal provisions are linked to the international and national law, but at the same time are autonomous and have unique mode of implementation in the legal systems of the member states, as well as a special method of enforcement. For those reasons its distinctive and ***sui generis*** nature should not be explained by traditional

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1 For the distinction between direct applicability and direct effect see J. Winter, Direct Applicability and Direct Effect - Two Distinct and Different Concepts in Community Law, (1972)9 ***CML Rev***., 425.

2 See S. Prechal, Does Direct Effect Still Matter? 37 ***CML Rev***., (2000) 1047-1069, J. Bengoetxea, Is Direct Effect a General Principle of European Law? In: U. Bernitz, J. Nergelius, C. Cardner and X. Groussot, ***General Principles of EC law in a process of development***, Kluwer, 2008, on p. 8 and the title: 1.1.1.3. "Can Anything New Be Said About Direct Effect?

3 See authors which quotes Arnull, Dashwood, Ross and Wyatt, ***Wyatt & Dashwood's European Union Law,*** London, 2000, p 62, footnote 21, S. Prechal, ***op. cit.***, p. 260, footnote 98.

4 See authors which cites S. Prechal, ***op. cit.***,p. 260, footnote 85.

5 S. Prechal, ***op. cit.***, p. 260.

6 Arnull, Dashwood, Ross and Wyatt, ***op. cit.***, p. 61, J. Winter, 1972 ***CML Rev***., 425.

institutions of international law,[7] such as the theory of self-executive norms,[8] but rather by special community principles such as the principles of direct application and direct effect. Therefore, it is believed that direct effect is "essential characteristic of the Community legal order and without it Community legal order would not be the same."[9] However, for others, direct effect is "an infant disease" of Community law and was "a highly political ideal."[10] According to that opinion, the main purpose of the adoption of legal provisions is their enforcement and consequently, the applicability and effect of the law, for e.g. the direct application and direct effect, must be considered as an internal characteristic of every legal provision, without explicit emphasize.[11] Therefore, it would be meaningless to talk about law and legal provisions which are non-applicable and accordingly have no legal effect, or have no capacity to affect the rights and obligations of the respective subjects. According to this concept, the law is manifested and exhausted in its implementation and effects, and these phenomena are so closely related that it is pointless and immature to speak about direct application and direct effect as some special features of the Community law, because that should be non-disputable in every "healthy law".[12]

The Court of Justice itself has contributed to those confused interpretations of the concepts of direct application and direct effect and their interchangeable use by not making clear the distinction between those terms, or using them as synonyms in its decisions in some cases. [13] There are some opinions that the

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[7] P. Eleftheriadis, The Direct Effect of Community Law, 16 ***Yearbook of European Law*** (1997) 205-221.

[8] J. H. Jackson, Status of Treaties in Domestic Legal Systems: A Policy Analysis, ***AJIL***, vol 86(1992) pp. 310-340.

[9] D. Edward, Direct Effect – Myth, Mess or Mystery?, available on http://www.amicuria.org/library/Amicale_Edward_direct-effect_2001-12-05.pdf, accessed 26.06.2010), p. 1.

[10] P. Pescatore, The Doctrine of Direct Effect: An Infant Disease of Community Law, ***EL Rev***., (1983) 8, 155, at p. 158. Answering on that qualification, judge D. Edward consider that "direct effect is not a disease but that is liable to become a virus infecting correct analysis of what are in reality separate though related problems." D. Edward, ***op. cit***., p. 1.

[11] Pescatore, ***op. cit***., p. 155.

[12] ***Ibid***.

[13] See case 2/74 ***Reyners*** [1974] ECR 631, in which Court stated that Art. 43 of the Treaty is directly applicable; Case 17/81 ***Pabst*** [1982] ECR 1331, Case 104/81 ***Kupferberg*** [1982]

ECJ "has mystified a simple problem in order to confer a special sanctity on the Community legal order and therefore on the Court." [14]

There is also confusion in terminology within different languages of Member States. Different expressions are used in German (***unmittelbare Wirkungen*** - plural), in French (***effets*** and ***effets directs immédiats*** - plural)) and in Dutch (***onmidelijk effect*** (singular) and ***direct werking***). The Italian texts use fairly different terminology (***atto a produrre direttamente degli effetti sui Rapport*** and [avendo] ***precettivo valorem***).

For all those reasons, the concept of direct effect has become one of the most discussed and most important legal doctrines created by the ECJ. [15]

Leaving aside the details of this quite thought-inspiring discussion in abundant literature,[16] the initial idea in this paper is the thesis that those two are different legal institutes and it is required to make distinction between them, no matter of the occasional overlap in their meaning and purpose owing to the fact that both of them are contribution to the effective and efficient implementation of EU law within the Member States. [17]

2. Conditions for direct effect

The notion or concept of direct effect was not mentioned in the founding treaties, but derived from the jurisprudence of the Court of Justice. While deciding about direct effect of concrete provisions in the procedure of interpretation, the Court of Justice first sought to determine whether the Community legislature intended to give only the character of the program's

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ECR 3641). For comment see: Arnull, Dashwood, Ross & Wyatt, ***Wyatt & Dashwood's European Union Law***, London, 2000; F. Becker & A. Campbell, Direct Effect of European Directives: Towards the Final Act?, ***Col. J. of European Law***, Vol 13(2007), 401, at. 407.

[14] D. Edward, ***op. cit***., p. 1.

[15] See Prinssen, in: Prinssen, J.M and Schrauwen. A . (eds.), ***Direct Effect: Rethinking a Classic of EC Legal Doctrine***, Europe Law Publishing, 2002, pp. 105-126..

[16] J. Winter, Direct Applicability and Direct Effect: Two Distinct and Different Concepts in Community Law, 9 ***CMLRev***. 425, 1972; S. Prechal, ***Directives in European Community Law***, Oxford, University Press 1995, pp. 260-4.

[17] See F. Snyder, The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques, 56 ***Modern Law Review*** (1993) 19-56.

norms[18] to those concrete provisions, to specify the imperative rule for the respective subjects, or to grant rights or impose certain obligations to individuals. Initially, the Court of Justice permitted direct effect only to the provisions of the EEC Treaty, which have been defined precisely enough for the court application and imposed unconditional obligations.

Hence, in the case of ***Van Gend en Loos***,[19] the Court has ruled that "Article 12 of the Treaty establishing European Economic Community produces direct effect and creates individual rights which national courts must protect."[20] Latter, the Court modified and refined the test of direct effect on three conditions:

1) the provision must be clear and unambiguous,
2) it must be unconditional,
3) its operation must not be dependent on further action being taken by Community or national authorities

As for the conditions or test for the recognition of direct effects, the first requirement relates to the nomotechnical formulation of legal provisions themselves, while the second one is concerned with its content or subject matter (the prohibition) which should not have been subjected to the existence of implementing measures (unconditional or unreserved). In the following practice of the Court of Justice, the second condition has been reworded into an unconditional obligation, but two additional requirements were inserted: the provision must establish a complete and legally perfect obligation and must not depend on the latter measures to be adopted by the authorities of the European Union or its Member States. Likewise, the Court of Justice later extended this test to the provisions of other provisions: regulations, directives and decisions, which led to liberalization and expansion of its application[21] to all sources of Community law.[22]. Those tests

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[18] In that sense Lasok & Bridge, ***Law and Institutions of the European Communities***, Butterworths, 2001, p. 343.

[19] Case 26/62, ***NV Algemene Transporten Expeditie Onderneming Van Gend en Loos v. Nederlandse Administrate der Belastingen*** [1963] ECR 1, para 5.

[20] ***Ibid***.

[21] D. Chalmers, C. Hadjiemmannuil, G. Monti & A. Tomkins, ***European Union Law***, CUP, 2006, p. 368..

[22] See, P. Craig and G. de Burca, ***EU Law, text, cases, and materials***, OUP, 2008, pp. 277/279, R. Vukadinović, EU Law (in Serbian "Pravo EU"), 2006, pp. 162-175, T.

have led to the conclusion that not all directly applicable provisions of Community law were capable to produce direct effect. Some were formulated as incomplete legal norms, while others were of general nature and required the adoption of additional measures (implementing acts) for their implementation. In the first case the obstacles for direct effect of relevant provisions were deriving from the formal legal technical reasons. In the second case, such provisions could not produce immediate effect because of their content, the fact that there was no intention to be given that status.

Only directives were granted with direct effect by the Court, but just vertical direct effect, not horizontal one. Thus, in ***Van Duyn*** case the Court stated that the effect of the directive "would be weakened if individuals were prevented from relying on it before national courts and if the latter were prevented from taking it into consideration as an element of Community law."[23] Practically it means that direct applicability of regulations in turn does not exclude other legal instruments from having "similar effects."[24] Therefore it would be incompatible with binding effect attributed to directive ..... to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned."[25]

DIFFERENT MEANINGS OF DIRECT EFFECT

With regard to the content, the concept of direct effect was initially understood as conferring the rights to individuals which they could enforce in national courts. This concept was first stated in the judgment ***Van Gend en Loos*** in 1963[26] in which the Court ruled that "community law ... is intended to confer upon individuals rights which become part of their legal heritage." Correspondingly, the immediate or direct effect of Community law should mean the ability or capacity of the provisions of Community law to confer rights and impose obligations directly, and that such rights or obligations could be invoked by individuals, without intervention of administrative or

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Opperman / Classen / Nettesheim, ***Europarecht***, Muenchen, 2009, SS. 163-164. N. Foster, ***Foster on EU Law***, OUP, 2006. pp;. 173-179. J. Faihurst, ***Law of the European Union***, Pearson&Longman, 2006, pp. 233-251.

[23] Case 41 / 74, ***Van Duyn v. Home Office***, [1974] ECR 1337, para 12.

[24] Case 41 / 74, ***Van Duyn v Home Office***, 1974 ECR 1337, 1348.

[25] ***Ibid***.

[26] Case 26 / 62, ***NV Algemene Transporten Expeditie Onderneming Van Gend en Loos v. Nederlandse Administrate der Belastingen*** [1963] ECR 1, para 5.

judicial bodies. This understanding can be called as "***subjective dirrect effect***." In addition to this effect, the principle of direct effect creates ***procedural effects*** respectively. [27]

In terms of procedure, direct effect imposes obligation for national courts to provide required judicial protection to individual rights established. In other words, the ultimate rationale of direct effect of Community acts can be found in the "effective implementation of Community law in the Member States".[28] Hence, the direct effect means at the same time "the obligation for the court and other authorities to implement the relevant provisions of Community law – either as a norm that regulates the case, or as a standard for legal review."[29] In other words, the core of direct effect is an obligation to apply. In this definition based on "*invocability*" of a EC/EU provision before the national courts the direct effect was understood as "the technique which allows individuals to enforce a subjective right, which is only available in the internal legal order in an instrument that comes from outside that order, against another (state or private) actor."[30]

In this capacity principle of direct effect can be, also, used as standard for review of the legality of the member states measures and actions. "The standards for a legal review" assume that provisions of the Community law granted with direct effect, establish criteria for assessment of the legal validity of national regulations or in the broader sense, their conformity or non-compliance with Community law. If discovered that certain provisions of national regulations had not been in accordance with the provisions of the community law granted with direct effect, the member state has obligation to prevent their application and have them either suspended or harmonized by competent authorities. In that sense, the Court ruled that the legal status of a conflicting national measure was not relevant to the question whether

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[27] See. Winter, ***op. cit.***, pp. 425-438; Dashwood, The Principle of Direct Effect in European Community Law, 16 ***JCM Stud***. (1977) pp. 229-246; Pescatore, The Doctrine of "Direct Effect": An Infant Disease of Community Law, 8 ***ELRev***. (1983) pp. 155-177; B. de Witte, Direct Effect, Supremacy, and the Nature of the Legal Order, p. 187. in: P. Craig and G. de Burca (eds.), ***The Evolution of EU Law***, Oxford, 2011.

[28] M. Ruffert, Rights and Remedies in European Community Law: A Comparative View, 34(1997) ***CML Rev***., 307, at p. 316.

[29] S. Prechal, ***Directives in European Community Law***, OUP, 1995, p. 276.

[30] Lenaerts and Corthaut, Towards an internally consistent doctrine on invoking norms of EU law, research paper for the Binding Unity and Divergent Concepts in EU Law, Utrecht, 12-13 January 2006, at point 39. available at www.tilburguniversity.nl/budc-conference.

Community law should take precedence.[31] The procedure for review or annulment of legislative and administrative measures can be initiated by individuals as well.[32] Given the fact those provisions which set standards for the review does not necessarily assign individual rights, this ***procedural legal aspect*** of the concept of direct effect has been more emphasized in legal theory. [33]

The fact that possibility of making claims (***invocability***) is directly connected with the material content of specific provision or regulation does not have an impact on this procedural legal aspect of direct effect. Therefore, such entitlement is not limited only to the provisions of Community law which confer rights, but it relates to the provisions "which can be relied upon and must be applied by the courts."[34] In other words, the direct effect means that persons (individuals) and legal entities (companies) have a right to refer to the Community law before national courts and ask for the enforcement of their subjective rights, or can oppose to some measures which are inconsistent with Community law. This feature of direct effect of Community law can be described as ***invocability***[35] or the ability of provisions of Community law to be referred to in the judicial proceedings. In that sense, the concept of direct effect is a broader idea than the concept of subjective rights.

Both narrow and broader understanding of direct effects exists in legal theory.[36] According to the broader definition, the concept of direct effect describes the capacity of provision of EC law to be ***invoked*** before national courts. This idea is occasionally described as "***objective direct effect***."[37] According the more restrictive definition, direct effect assumes the capacity of

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[31] Case 11/70 Internationale Handelsgesellschaft GmbH [1970] ECR 1125.

[32] W. Van Gerven, Non-contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe, ***Maastricht Journal of European and Comparative Law***, 1994, Vol. I, No 1, p. 9.

[33] Vid. C. Timmermans, Directives: Their Effect Within the National Legal System, ***CMLRev***. 16(1979), 537; B. de Witte, Direct Effect, Supremacy, and the Nature of the Legal Order, str. 187. u: P. Craig and G. de Burca (eds.), ***The Evolution of EU Law***, Oxford, 2011. , p. 323, specily p. 329.

[34] S. Prechal, ***op. cit.***, p. 267

[35] S. Prechal, ***op. cit***., p. 266.

[36] See S. Prechal, Does... , p. 1047.

[37] W. Van Gerven, Of Rights, Remedies and Procedures, 37(2000) ***CMLRev***., 501.

a provision of EC law ***to confer rights*** to individuals who are permitted to enforce them before national courts (***subjective direct effect***). [38]

The concept of direct effect can be analyzed ***in terms of differences that exist between public and private enforcement***. Beside the fact that such distinction is significant for separation of the concept of direct application and the concept of the direct effect, it is also vital for the content of the conception of direct effect itself. In both cases it is essential to identify who is responsible and accountable for the enforcement of community law: public or private subjects. In the first situation, public authorities possess power "to bring infringers to the court," either through a public arm of government or through actions taken by private individuals.[39] In contrast with that approach to the enforcement of community law, the aim of introduction of direct effect is to give legitimacy to its private enforcement by granting individuals with the right to refer to the Community law in order to protect their individual rights or challenge inconsistent national measures. In other words, this concept of direct effect originating from jurisprudence refers to the ability of individuals to derive their individual rights directly from Community law. This type of private enforcement of Community law places control over the process in the hands of ordinary individuals making it clearly distinctive from public enforcement mechanism. In that sense, the distinction between the principle of direct application and the principle of direct effect of Community law could be based on "the distinction between remedies in public and private law and the issue of ***locus standi***. Is this dispute a matter for judicial review of executive action or for a private legal remedy under the civil law? "[40]

In the same way, it is possible to make so-called theoretical distinction between provisions or instruments and norms, as the key for understanding the difference between concepts of direct application and direct effect.[41] Direct applicability is a characteristic of the instruments that constitute legal order, while direct effect is the internal feature of provisions contained in those instruments. With direct effect, it is the "internal" legal effect of Community provisions that is manifested in the ability or capacity of EU law

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[38] P. Craig and G. De Burca, ***op. cit***., p. 270.
[39] ***Ibid***, p. 269.
[40] D. Edward, ***op. cit***., p. 2.
[41] J. Bengoetxea, Direct Applicability or Effect, in: ***A true European: essays for Judge David Edward***, eds. David A. O Edward, Mark Hoskins, William Robinson, Hart Publishing, 2003, p. 354

to create individual rights, which could be enforced before national courts by any person concerned.[42] However, there are some opinions according to which not only does the principle of direct effect include the foundation of individual rights and obligations, but it also includes creation and protection of legitimate interests.[43]

If the direct effect was observed in terms of its functionality, from the position of a task or function accomplished by its appliance, the following features could be identified: the integrative function, the function of maintenance of unified legal system of the EU which is closely connected to the function of securing the supremacy of Community law over the national laws of the Member states, and finally the function of efficient or effective protection of the interests of individuals.

Within the first listed function, the use of direct effect together with direct application aim to provide direct and uniform application of Community law in all member states, enabling the Community to achieve goals that are primarily focused to further legal, economic and political integration of the member states. According to the principle of direct effect and the principle of loyalty,[44] national courts and administrative authorities of Member States are obligated to apply provisions of the Community law directly (not through the national implementing measures), which enables foundation and preservation of the established uniform legal system of EC/EU law. The uniformity of Community law/EU law and the uniform application of Community law would be jeopardized if national courts were entitled not only to interpret the community law, but also to decide about their application voluntarily.

Procedural capacity of the direct effect obliges national courts of member states to fully implement relevant provisions of EU without any intervention or referring to the national legislation. By direct application of Community law or its particular provisions, the individuals are granted with efficient,

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[42] See for instance Case 57/65 ***Lüttike v. Hauptzollamt Saarlouis*** [1966] ECR 205; Case 41/74 ***Van Duyn v. Home Office*** [1974] ECR 1337. In cases concerning directives, the ECJ uses a different formula, i.e. 'that the provisions may be relied upon by an individual against any national provision…' See Case 8/81 ***Becker v. Finanzamt Münster-Innenstadt*** [1982] ECR 53.

[43] S. Prechal, ***Dierctives in European Community Law***, OUP, 1995, p. 267.

[44] See Article 10 of the EC Treaty or Art.4 (3). Lisbon Treaty on European Union.

effective and comprehensive legal protection at national level. Therefore, the recognition of the principle of direct effect enables achievement of both macro objectives on the Community level (EU level) and the protection of micro or individual interests. Finally, the consistent application of the principle of direct effect virtually acknowledges the primacy or superiority of the Community law or its specific provisions over the national legislation, independently and without reference to the established principle of supremacy. This is because the fact that procedural capacity of the provisions that are being granted with the direct effect, obliges national courts to apply them totally, leaving aside all national regulations no matter of the solution they contain. In case those national regulations contain conflicting solutions, using direct effect means effectively the same as the application of the principle of supremacy.

By virtue of the doctrine of supremacy of EC law, provisions of Community law with 'direct effect' take precedence over domestic laws.[45] The rationale for attributing direct effect to directives was to secure the 'useful effect' (***effet utile***) of the EU legislation. Since EC law was a new transnational legal order capable of conferring rights on individuals.

In addition to the direct effect, it could be discussed about other instruments for maximizing the effects of Community law,[46] which are directly associated with direct action. Those instruments include indirect effect and incidental horizontal direct effect.

PRACTICAL SIGNIFICANCE OF THE PRINCIPLE OF DIRECT EFFECT

The reasons for the expansion of appliance of the principle of direct effect to all sources of Community law and particularly for the liberalization of the conditions used for testing the possibility of direct effect of the concrete provision by the Court of Justice of the EU, could have both theoretical and practical explanations. In practical terms, it is evident that the Court intended to expand the useful effect (***effet utile***) of the principle to the other subjects as well. Theoretically, it could be justified by the Court's efforts to pass on to the individuals the enforcement and use of individual rights by entitling them to refer directly to the provisions of Community law, and even to the provisions which enforcement assumed the adoption of implementing measures which

[45] ***Flaminio Costa v. ENEL***, Case 6/64, [1964]). ECR 585.
[46] M. Horspool and M. Humphreys, ***European Union Law***, OUP, 2006, p. 166.

have not been adopted by the state. Nevertheless, the effect of this principle is not exhausted only in conferring the individual rights and obligations, but also in imposing the obligation of the national courts and the related Member States to ensure their effective implementation. Consequently, within the concept of direct effect, the individuals should be granted with the efficient system of legal protection by entitling them (giving them the active capacity or ***locus standi***) to initiate proceedings before national courts in cases when their individual rights granted by the Community law have been violated, or to refer to those provisions before "other authorities", so called administrative direct effect.[47] Individual rights could have been violated in two ways: by preventing their creation and hindering their protection if already created. The creation could have been prevented by not implementing or incomplete implementing the directives. Since directives by definition have no direct application, they become part of the national law of Member States only by the adoption of implementing measures which may contain provisions that grant rights and impose obligations to the individuals. Otherwise, individuals could not be able to exercise their rights due to the fact that administrative and other authorities do not recognize direct effect of the respective Community regulations. In case that the Court of Justice has approved direct effect to the specific provision of Community law, but the authorities of the member state do not recognize it, the individuals whose rights have been violated this way can initiate proceeding before national court and, referring to the principle of direct effect, ask for legal protection. Such situations may arise either in case when concrete subject-matter was regulated in a different way by national regulations comparing to the relevant provisions of Community law with direct effect recognized by the Court, or in the case when such subject-matter has not been regulated by internal regulations at all, but the state authorities or private individuals refuse to recognize the direct effect to the provisions of the Community law. In both cases national courts are obliged to apply provisions of community law, but with regard to the first one, they will set aside conflicting internal regulations, i.e. to initiate proceeding for that. In the case when individual rights granted by community law have been violated by conduct of the state or public authorities, judicial protection will be justified by recognition of vertical direct effect. In case that those rights have been violated by individuals, national courts are obliged to provide required judicial

[47] De Witte, ***op. cit***., p. 188.

protection only if violated rights are incorporated in community provisions granted with so-called horizontal direct effect.

On the other side, without recognition of direct effect to certain provisions of Community law as invocable rights and obligations, in cases of their violation, individuals would be required to address the Commission, which would strive to compel the state to cease with such behaviour in a separate, complex and lengthy procedure.[48] However, individuals affected by such actions would not be able to get compensation for damage, the return of over-paid duty for example. It is irrelevant for them whether the states or other entities would be prohibited from continuation of the same practice. What matters for them is to be able to use the rights established by the Community provisions with direct effect recognized by the Court of Justice effectively.

Finally, the understanding and enforcement of principle of direct effect relates on international law and process of harmonization.[49] Coupled with international law, the principle of direct effect should be understood as "implementing as balancing of constitutional principles such as international cooperation, democratic government, or subsidiarity."[50] As concerning of process of harmonization, one of the consequences of direct effect is an increasingly pressure to harmonize different national laws

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[48] Easson, Legal Approaches to European Integration: The Role of Court and Legislator in the Completing of the European Common Market, u: ***European Community Law***, Vol. I, Ed. by F. Snyder, Dartmounth, Hong Kong, Singapore, Sydney, 1993, p. 318

[49] A. von Bogdandy, Pluralism, direct effect, and the ultimate say, ***I CON***, July/October, 2008, Vol. 6:397, pp. 404-405.

[50] Ibid., p. 398. On direct effect of international law in EU law see: A. von Bogdandy and A, Smrkolj, European Community and European Union Law and International Law, Max Planck Encyclopedia of Public International Law www.mpepil.com; in particular the WTO, in: T. Cottier, International Trade Law: The Impact of Justiciability and Separation of Powers in EC Law, NCCR Trade Regulation, WOrkin Paper No 2009/18, APrila 2009, available on www.nccr-trade.org

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POJAM I OBLICI NAČELA DIREKTNOG DEJSTVA EVROPSKOG KOMUNITARNOG PRAVA

Rezime

Pitanje direktnog dejstva komunitarnog propisa, odnosno prava EU, predstavlja jedno od složenijih pitanja čije je rasvetljvanje značajno podjednako i za pravnu teoriju i za praksu. Složenost načela direktnog dejstva se ogleda u tome što nije jasno povučena razlika u odnosu na sličan institute direktne primene i zbog toga što se pod njim podrazumevaju različite stvari, tj. značenja. U radu se polazi od uobičajenog shvatanja prema kome se pod direktnim dejstvom podrazumeva sposobnost normi (odredbi) prava EU da neposredno dodele sujektivna prava ili nametnu obaveze komunitarnim subjektima čiju zaštitu su dužni da obezbede nacionalni sudovi u državama članicama. Međutim, pored ovog nespornog materijalno pravnog značenja, u radu se navode i druga značenja ("lica"), kao što su utuživost ili suprematija nad konfliktnim nacionalnim propisima.

Ključne reči: komunitarno pravo, pravo EU, direktno dejstvo, direktna primena, pravna zaštita, Evrospki Sud pravde..

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Revija za evropsko pravo: XIII (2011) 1.

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UDK: 339.137.2:340.134(497.11)

str. 49-64

PRIMENA ODREDABA SPORAZUMA O STABILIZACIJI I PRIDRUŽIVANJU O ZAŠTITI KONKURENCIJE PRED DOMAĆIM SUDOVIMA[1]

SPORAZUM O PRIDRUŽIVANJU I PRELAZNI TRGOVINSKI SPORAZUM

Predmet Sporazuma o stabilizaciji i pridruživanju (u daljem tekstu: Sporazum o pridruživanju ili SSP) je stvaranje zone slobodne trgovine između Srbije i EU. Sporazum o pridruživanju i Prelazni trgovinski sporazum (u daljem tekstu: Prelazni trgovinski sporazum ili PTS) sadrže odredbe o zaštiti konkurencije. Preciznije, Prelazni trgovinski sporazum u stvari u članu 38 preuzima odredbe o konkurenciji sadržane u članu 73 Sporazuma o pridruživanju. Stupanjem na snagu Prelaznog trgovinskog sporazuma, 1. februara 2010. godine, stupile su na snagu i počele su da se primenjuju te odredbe Sporazuma o pridruživanju koje su sastavni deo Prelaznog trgovinskog sporazuma.

Članom 73 SSP (38 PTS) se na posredan način u Srbiju uvodi zabrana restriktivnih sporazuma iz člana 101 Ugovora o funkcionisanju EU (u daljem tekstu: UFEU) i zabrana zloupotrebe dominantog položaja iz člana 102. Naime ovakva ponašanja su suprotna „pravilnom funkcionisanju ovih sporazuma" iz čega posredno proističe obaveza nadležnih organa u Srbiji da

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* Profesor Pravnog fakulteta u Novom Sadu.

[1] Autorizovano predavanje održano u Školi evropskog prava na Zlatiboru, 22. februara 2011. godine.

spreče takve sporazume i takvo ponašanje preduzeća, koji su u neskladu sa Sporazumom o pridruživanju, odnosno Prelaznim trgovinskim sporazumom.

Prema ovoj odredbi, nisu u skladu sa pravilnim funkcionisanjem sporazuma:

1) sporazumi (ugovori) između preduzeća, odluke udruženja preduzeća i usaglašena praksa između preduzeća, čiji je cilj ili posledica sprečavanje, ograničavanje ili narušavanje konkurencije,
2) zloupotreba dominantnog položaja od strane jednog ili više preduzeća na teritorijama Zajednice ili Srbije, u celini ili na njihovom značajnom delu i
3) svaka državna pomoć koja narušava ili preti da naruši konkurenciju davanjem prednosti određenim preduzećima ili određenim proizvodima.

Sporazumi i postupci privrednika koji su suprotni ovim odredbama od značaja su samo u meri u kojoj mogu uticati na trgovinu između Zajednice (sada Unije) i Srbije.

Ugovorne strane ovih ugovora (Evropska zajednica, države članice Evropske zajednice i Srbija) dužne su da povere operativno nezavisnom organu ovlašćenja neophodna za potpunu primenu prve i druge tačke prvog stava člana 73 SSP (38 PTS) u odnosu na privatna i javna preduzeća i preduzeća kojima su dodeljena posebna prava. U Srbiji taj organ je Komisija za zaštitu konkurencije.

Prilikom ocene postupanja preduzeća polazi se od pravila konkurencije koja se primenjuju u Zajednici (sada Uniji): „Svako postupanje suprotno ovom članu ocenjivaće se na osnovu kriterijuma koji proističu iz primene pravila konkurencije koja se primenjuju u Zajednici, naročito iz članova 81, 82, 86 i 87. Ugovora o EZ i instrumenata tumačenja koje su usvojile institucije Zajednice."[2]

Navedena pravila Prelaznog trgovinskog sporazuma će se uskoro primenjivati i na javna preduzeća koja imaju monopol na tržištu, (tri godine nakon stupanja na snagu Prelaznog sporazuma, tj. od 1. januara 2013).[3]

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[2] Sada su to članovi 101, 102, 106 i 107 UFEU.
[3] Član 74. u vezi sa članom 139 SSP / član 39 PTS.

Pravila o zaštiti konkurencije čine značajan segment prava Unije i jednu od njenih najstarijih pravnih tekovina. Postupanje u skladu sa ovim pravilima (primena istih kriterijuma) pri oceni ponašanja domaćih privrednika postalo je međunarodna obaveza Srbije na osnovu Prelaznog trgovinskog sporazuma.

Ovde nije reč samo o obavezi da se pravo Unije o konkurenciji unese u domaći pravni poredak na osnovu obaveze usvajanja pravnih tekovina Unije (acquis communitaire). Reč je o koraku više – odnosno, o obavezi primene ovog prava na način na koji se ono primenjuje u Uniji. Takvu obavezu imaju sve države koje su sa Unijom zaključile sporazume o stabilizaciji i pridruživanju. Srbija zaključivanjem Sporazuma o pridruživanju i stupanjem na snagu Prelaznog trgovinskog sporazuma nije dobila nikakvu novu obavezu u pogledu zaštite konkurencije – zabrana restriktivnih sporazuma i zloupotrebe dominantnog položaja bila je predviđena ranije važećim Zakonom o zaštiti konkurencije iz 2005. godine.[4] Novina je u tome da se pri oceni ponašanja u skladu sa zakonom od sada moraju primenjivati kriterijumi koji su usvojeni u stranom pravnom poretku – u pravnom poretku EU.

Ovoj obavezi podležu organi primene prava u Srbiji:

1) Komisija za zaštitu konkurencije i
2) nacionalni sudovi

Interpretativni akti koji se odnose na član 101, 102, 106 i 107 UFEU obuhvataju više od hiljadu različitih pravnih dokumenata, među kojima se nalaze i mnoge odluke sudova Unije.[5]

USLOVI ZA PRIMENU KRITERIJUMA IZ PRAVA EU

O načinu na u koji se pravo konkurencije primenjuje u Evropskoj uniji ne može se dovoljno saznati bez proučavanja prakse Suda Evropske unije. Pokazalo se da smačenja Suda od odlučujućeg značaja u oblasti prava konkurencije.

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[4] S. Graić-Stepanović, Efekti pristupanja Srbije Evropskoj uniji – politika konkurencije, http://www.pks.rs/portals/0/eu/11%20Konkurencija.pdf, str. 5.

[5] Plahutnik, A., Pravila konkurencije u Evropskoj uniji i njezinim članicama. Preuzeto sa vebsajta: http://www.acpc-rs.org/ppt/mc/AP-acpc-140708.pdf.

Vratimo se sada na uslov za primenu kriterijuma iz prava EU – da zabranjeno ponašanje može uticati na trgovinu između Zajednice i Srbije. Uslov je preuzet iz člana 101 UFEU koji zabranjuje restriktivne sporazume u Evropskoj uniji, s tim da su reči „između država članica" zamenjene u našem sporazumu rečima „između Zajednice i Srbije". Isti zahtev se ponavlja i u članu 102 UFEU koji se odnosi na zabranu zloupotrebe dominantnog položaja.

Zbog toga je za pravilno tumačenje ovog uslova u domaćem pravu potrebno poznavati njegovo tumačenje u pravu Unije. Na osnovu ovog uslova primena članova 101 i 102 u državama članicama Unije je ograničena na sporazume i zloupotrebe koja imaju prekogranični karakter – čije se dejstvo vezuje za trgovinu između najmanje dve države članice. Antikonkurentski sporazumi i praksa koji nemaju uticaja na trgovinu između država članica ostaju izvan polja primene pravila unije o konkurenciji i mogu da se sankcionišu samo nacionalnim propisima.

Sud EU je u praksi odredio pojam uticaja na trgovinu, a Komisija je zatim objavila Obaveštenje--uputstvo o pojmu uticaja na trgovinu[6] u kome je nastojala da sa osloncem na praksu Suda precizno definiše ovaj pojam.

Tumačeći odredbe člana 101, stava 1, Sud unije je stao na stanovište, koje je kasnije prihvatila i Komisija, da se ove odredbe ne primenjuju ako ne postoji osetna posledica (appreciable effect) sporazuma na trgovinu između država članica.[7] Drugim rečima, čak i ako sadrže najokorelije restrikcije konkurencije, ugovori između privrednika mogu izbeći posledicu ništavosti po pravu Unije ukoliko je njihov uticaj na konkurenciju ili na trgovinu zanemarljiv. Takvo stanovište je od izuzetnog značaja za mala i srednja preduzeća koja posluju u Uniji. Iz toga sledi da uslov za primenu evropskih kriterijuma od strane Komisije za zaštitu konkurencije i nacionalnih sudova treba tumačiti na sledeći način:

Sporazum, odnodno zloupotreba, treba da ima

1) prekogranično dejstvo – da utiče na trgovinu između Srbije i bar jedne države članicu EU i

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[6] Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (Text with EEA relevance) OJ C 101, 27.4.2004.

[7] A. Jones, B. Suffrin, ***EC Competition Law, Text, Cases and Materials***, Oxford 2004, str. 168.

2) osetno dejstvo (appreciable effect) – da osetno utiče na obrazac trgovine između tih država.

PREKOGRANIČNO DEJSTVO

Test da li postoji prekogranično dejstvo restriktivnog sporazuma naziva se testom uticaja na obrazac trgovine između država članica (pattern of trade test). Široko tumačenje ovog testa usvojeno je još 1958. godine u odluci Suda EZ u predmetu 56/65 Sosijete la teknik minijer protiv Mašinenbau Ulm (Société La Technique Minière v. Maschinenbau Ulm GmbH). Prema ovoj odluci, uticaj sporazuma na obrazac trgovine između država članica može da bude neposredan ili posredan, stvaran ili potencijalan. Nije stoga neophodno dokazati stvarni uticaj – dovoljno je da postoji verovatnoća da će biti takvog uticaja. Sud EZ odgovara na pitanje da li postoji odgovarajući uticaj na trgovinu između država članica takođe u odluci u predmetu Konsten i Grundig protiv Komisije iz 1966. god.[8] U pitanju je bila trgovina između Nemačke i Francuske. Sud je ustanovio da se član 101. primenjuje i na restriktivni sporazum koji u stvari dovodi do povećanja trgovine između država članica, sa sledećim obrazloženjem:

> "Tuženi (Komisija) odgovara da je ovaj uslov iz člana 85, stava 1, ispunjen kada se trgovina između država članica kao rezultat sporazuma razvije na drukčiji način od onog na koji bi se razvila bez ograničenja koje potiče iz sporazuma i kada uticaj tog sporazuma na tržišne uslove dostigne određeni stepen.
>
> Prema navodima tuženog, to je slučaj u ovom predmetu, posebno ukoliko se uzmu u obzir prepreke koje na zajedničkom tržištu stvara sporni sporazum u pogledu uvoza i izvoza Grundigovih proizvoda u Francusku i njihovog izvoza iz Francuske.
>
> Pojam sporazuma koji bi mogao da utiče na trgovinu između država članica je stvoren da bi se u antikartelskom pravu definisala granica između polja primene prava Zajednice i nacionalnog prava.
>
> Samo u meri u kojoj sporazum može da utiče na trgovinu između država članica, narušavanje konkurencije koje on prouzrokuje potpada pod

[8] Predmet 56 i 58/64 ***Konsten protiv Grundiga*** (Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission). Prevod odluke na srpski nalazi se u zbirci Paragraf.leks.

zabranu prava Zajednice sadržanu u članu 85; u suprotnom on pod tu zabranu ne potpada.

S tim u vezi, posebno je važno znati da li je taj sporazum u stanju da predstavlja, ***neposrednu ili posrednu, stvarnu ili potencijalnu pretnju slobodi trgovine između država članica*** na način da bi mogao da ugrozi realizaciju ciljeva jednog jedinstvenog tržišta između država.

Stoga, okolnost da jedan sporazum podstiče povećanje obima trgovine između država, makar ono bilo i veliko, nije dovoljna da se isključi mogućnost da bi taj sporazum mogao da „utiče" na tu trgovinu na gore navedeni način.

U ovom predmetu, ugovor između Grundiga i Konstena koji s jedne strane sprečava ostala preduzeća osim Konstena da uvoze Grundigove proizvode u Francusku, a sa druge strane, zabranjuje Konstenu da izvozi iste proizvode u druge zemlje zajedničkog tržišta, nesporno utiče na trgovinu između država članica." (naglasak autora)

U ovom slučaju, situacija je bila relativno jednostavna, jer su društva koja su zaključile restriktivni sporazum imala pripadnost država članica, te nije bilo teško zaključiti da njihov sporazum utiče na trgovinu između država članica.

Međutim, restriktivni sporazum koji se odnosi na trgovinu sa nekom trećom zemljom može takođe osetno uticati na trgovinu između država članica. ***Džons i Safrin*** navode kao primer ugovor o ekskluzivnoj distribuciji kojim se distributer u nekoj trećoj zemlji ograničava u pravu da prodaje proizvode izvan svoje ugovorne teritorije, koji takođe može imati takav uticaj, ako bi inače preprodaja datih proizvoda na teritoriji Unije bila moguća i verovatna.[9]

Čak i sporazumi koji se odnose samo na jednu državu članicu ponekad mogu uticati na trgovinu između država članica. U predmetu S-234/89 ***Delimitis*** (***Delimitis v. Henniger Bräu***) postavilo se pitanje da li sporazum između nemačke pivare i vlasnika kafea u Nemačkoj može da utiče na trgovinu između država članica. Sud EU nije isključio ovakvu mogućnost u principu, već je uputio nacionalni sud da detaljnije prouči sam ugovor, vodeći računa o tome da li se ugovorom posebno otežava društvima iz drugih država članica da prodru na dato tržište.

[9] A. Jones, B. Suffrin, ***op.cit.***, str. 172.

Ako je u pitanju restriktivni sporazum kojim se uspostavlja nacionalni kartel u nekoj oblasti, obično se njime ograničava i konkurencija iz inostranstva, pa takav sporazum može takođe potpadati pod primenu prava Unije iako su ga zaključile domaća privredna društva, posebno ako se proizvod ili usluga na koji se kartel odnosi može lako uvoziti iz Unije ili izvoziti u Uniju. Na nacionalnom sudu je da odluči da li takav sporazum može imati uticaja na trgovinu sa Unijom.[10]

OSETNO DEJSTVO

Sporazum takođe mora da ima osetno dejstvo na trgovinu sa Unijom. Pasusi 50-57 Uputstva o uticaju na trgovinu sadrže kvantitativni test - the NAAT rule (no appreciable affect on trade) kojim se isključuju iz domena primene prava Unije određeni restriktivni sporazumi manjeg ekonomskog značaja. Nemaju osetan uticaj sporazumi koji ispunjavaju dva kumulativno postavljena kriterijuma koji se odnose na udeo učesnika u sporazumu na tržištu unije i na njihov ukupan godišnji promet:

a) ukupan udeo učesnika u sporazumu i na tržištu Unije je manji od 5% i

b) ukupan godišnji promet u Uniji svih učesnika u sporazumu za proizvod koji je predmet sporazuma ne prevazilazi 40 miliona evra.

Ovaj test iz Uputstva bi se mogao shodno primeniti na ocenu da li sporazum koji treba da ispita srpska Komisija za zaštitu konkurencije ima osetno dejstvo na trgovinu između Srbije i Unije, te da li je Komisija u datom slučaju obavezna da primenjuje kriterijume i instrumente tumačenja EU.

Nakon što smo se upoznali sa tumačenjem ovog uslova za primenu instrumenata i kriterijuma iz prava EU dozvoliću sebi da postavim pitanje, da li će Komisija za zaštitu konkurencije i domaći sudovi uopšte ispitivati da li je ispunjen ovaj uslov u praksi. Kakav je praktični značaj ovog uslova? Naime, ukoliko uslov nije ispunjen, Komisija i sudovi bi bili slobodni da primenjuju domaće kriterijume i domaće instrumente na tumačenje normi o zaštiti konkurencije. Međutim, kako je pravo konkurencije relativno nova grana prava u Srbiji, u kojoj standardi još nisu izgrađeni, odsustvo obaveze da se primene standardi tumačenja iz prava Unije još ne znači da oni ne bi bili primenjeni, jer možda u konkretnom slučaju drugih pravila i nema. Drugim

[10] ***Ibidem***, str. 174.

rečima, može se pretpostaviti da bi Komisija za zaštitu konkurencije i sudovi, i u slučajevima kada na to nisu obavezni, bili skloni da primene standarde tumačenja iz prava EU.

PRIMENA KRITERIJUMA IZ PRAVA EU OD STRANE KOMISIJE ZA ZAŠTITU KONKURENCIJE

Komisija za zaštitu konkurencije je "nezavisno telo kome su poverena ovlašćenja neophodna za potpunu primenu člana 38, stava 1, tačaka 1 i 2 Prelaznog trgovinskog sporazuma" o kome je bilo reči na početku predavanja. Kad god Komisija primenjuje domaća pravila o zaštiti konkurencije na sporazum ili na praksu za koje je utvrdila da utiču na trgovinu između Srbije i EU, dužna je da primenjuje čl. 38, stav 1 Prelaznog trgovinskog sporazuma i kriterijume i instrumente tumačenja iz prava EU. Komisija ne može da zabrani sporazume koji ne bi bili zabranjeni u smislu tog člana niti može da oslobodi zabrane sporazume koji bi njime bili zabranjeni.

Način primene normi iz osnivačkih ugovora o konkurenciji propisan je uredbama EU (EU regulations). U uredbama ćemo najpre naći kriterijume za primenu tih normi.Primena članova 101 i 102 uređena je Uredbom br. 1/2003 od 16. decembra 2002 godine koja je stupila na snagu 1. maja 2004. godine. Dalju razradu procesnih odredaba ove uredbe sadrži izvršna uredba 773/2004 od 7. aprila 2004 o načinu na koji Komisija vodi postupak na osnovu čl. 101 i 102.Treba takođe pomenuti kao značajne i uredbe o izuzeću određenih sporazuma po vrstama (tzv. blok izuzećima – block exemptions). Pored uredbi značajan izvor predstavljaju i obaveštenja, smernice, saopštenja i drugi opšti akti Evropske komisije doneti u ovoj oblasti, kao i praksa Suda EU.[11] Obaveštenja, smernice i saopštenja nemaju obaveznu snagu, ali su od velikog praktičnog značaja za preduzeća. Ovi akti bi se mogli svrstati u „instrumente tumačenja" koje pominje član 38, stav 2.[12] Stoga su za domaće organe u suštini obavezni. Npr. pominjali smo već smernice o uticaju na trgovinu. Tu su zatim smernice o razrezivanju kazni, obaveštenje o imunitetu od kazni, obaveštenje o određivanju relevantnog tržišta, obaveštenje o pravu na uvid u spise Komisije itd. Većinu ovih akata donosi Evropska komisija, nakon što Sud EU, preispitivanjem njenih odluka u postupku za utvrđivanje

[11] Ranije nazivan Sud Evropskih zajednica.
[12] S. Graić-Stepanović, ***op.cit***., str. 26.

ništavosti, utvrdi tumačenje koje treba primenjivati. Oni su u stvari kompedijumi sistematizovane ranije sudske prakse i iskustava Komisije u primeni normi o zaštiti konkurencije. Poseban problem predstavlja činjenica da je ovih akata mnogo i da još nisu svi prevedeni, mada je učinjen značajan napor da se najvažniji propisi i interpretativni akti prevedu. Kada su u pitanju presude Suda prevedeno ih je dvadesetak gotovo u celosti za pravnu zbirku Paragraf Leks. To je veliki posao, jer su odluke obimne, ali je neophodan da bi se obaveze naših organa iz čl. 38 mogle zaista izvršavati.

SUDSKA KONTROLA SPROVOĐENJA PRAVNIH NORMI O KONKURENCIJI U SRBIJI

Sudska kontrola sprovođenja pravnih normi o konkurenciji je trojaka.[13] Postoji najpre mogućnost vođenja upravnog spora protiv rešenja Komisije na zahtev učesnika na tržištu koji smatra da činjenično stanje nije pravilno utvrđeno, da je došlo do povrede postupka ili da materijalno pravo nije pravilno primenjeno. Postoji zatim, mogućnost vođenja građanskopravne parnice pred privrednim sudom za naknadu štete od strane jednog učesnika na tržištu protiv drugog ako je šteta nastala povredom prava konkurencije.[14] Nastupanje štete se ne pretpostavlja na osnovu donošenja odluke Komisije nego se mora posebno dokazati. Najzad, postoji i krivičnopravni postupak zbog zloupotrebe monopolskog položaja.[15] Ovome treba dodati i mogućnost da se naknada štete traži u upravnom sporu, od države, zbog toga što je Komisija za zaštitu konkurencije donela nezakonito rešenje kojim je naneta šteta učesniku na tržištu.

PRIMENA U UPRAVNIM SPOROVIMA

Primena kriterijuma usvojenih u EU pred domaćim sudovima dolazi u obzir naročito u prvoj kategoriji postupaka – u upravnim sporovima. Preispitivanje zakonitosti rešenja donetog u postupku pred Komisijom, sprovodi se po tužbi stranke u tom postupku, koja se podnosi Upravnom sudu.[16] Upravni sud

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[13] ***Ibidem***, str. 15.

[14] Zakon o zaštiti konkurencije, član 73.

[15] Krivični zakonik Srbije, čl. 232.

[16] Čl. 38, stav 4 zakona predviđa da je rešenje Komisije konačno, a protiv njega se može pokrenuti upravni spor. Čl. 71, stav 1 predviđa da se protiv konačnog konačnog rešenja Komisije može podneti tužba sudu u roku od 30 dana od dana dostavljanja rešenja stranci i da o njoj odlučuje Upravni sud.

donosi odluku po tužbi najkasnije u roku od dva meseca od prijema tužbe.[17] Najveći izazov će biti upravo ova situacija, kada upravni sud treba da donese odluku u kratkom roku, a za njeno donošenje je potrebno proučiti kriterijume koji se primenjuju na isto pitanje u pravu konkurencije EU. Uporednopravni materijali moraju biti unapred spremni – dostupni i prevedeni, odnosno sudije upravnog suda bi trebalo da budu upoznate sa sadržiom prava Evropske unije u ovoj oblasti. Svakako, uporedo sa prevođenjem mora da teče postupak obuke sudija. Treba imati u vidu da će na rešavanju ovakvih upravnih sporova raditi ipak jedan ograničen broj sudija (navodno, tri veća po tri sudije – dakle ukupno 9), pa bi organizovanje masovne obuke bilo necelishodno – obuka mora biti na individualnoj osnovi.

Poseban problem je što većina pravnika u Srbiji do sada nije imala prilike da se u svom obrazovanju susretne sa ovom relativno novom granom prava – pravom zaštite konkurencije. Zbog toga se može očekivati jedan duži proces prilagođavanja, dok ne stasaju nove generacije pravnika koje će više znati o tome.

Odredbe Prelaznog trgovinskog sporazuma imaju neposredno dejstvo, što znači da nacionalni sudovi imaju dužnost da ih primene kada se pojedinci na njih pozovu. Ako u toku primene ovih odredaba iskrsne pitanje njihovog tumačenja, kome sud može da se obrati za odgovor? U Evropskoj uniji isključiva nadležnost za tumačenje odredba Unije koje se odnose na zaštitu konkurencije pripada Sudu EU. Tumačenje Suda dobija se u postupku odlučivanja o prethodnom pitanju. Cilj postupka je da se pravo Unije tumači i primenjuje na jedinstven način od strane nacionalnih sudova u svim državama članicama. Pored toga, posredna korist od odluka o prethodnim pitanjima je u tome da se olakša primena prava Zajednice, jer se od nacionalnih sudova država članica očekuje da primenjuju pravo koje dovoljno ne poznaju. Svojim uputstvom u vidu odluke o prethodnom pitanju Sud EU može da im pomogne da reše eventualne dileme u vezi sa sadržinom i tumačenjem tog prava. Na primer u 2009. godini, zabeleženo je pet predloga za odlučivanje o prethodnom pitanju u oblasti konkurencije.

Srpski sud (upravni sud) nema pravo da se obraćaju Sudu EU sa predlogom za odlučivanje o prethodnom pitanju. Takvo pravo neće dobiti ni na osnovu Sporazuma o pridruživanju kada taj sporazum stupi na snagu. Ako u toku primene normi o zaštiti konkurencije dođu u dilemu o tumačenju pojedine

[17] Zakono o zaštiti konkurencije, čl. 72, st. 5.

odredbe na koju treba primeniti kriterijume iz prava Unije, upravni sud bi mogao da se obrati Vrhovnom kasacionom sudu koristeći postupak za rešavanje spornog pravnog pitanja iz čl. 176-180. Zakona o parničnom postupku, jer se odredbe Zakona o parničnom postupku shodno primenjuju u upravnim sporovima.[18]

PRIMENA U GRAĐANSKOPRAVNIM PARNICAMA ZA NAKNADU ŠTETE

Građanskopravne parnice za naknadu štete pred nadležnim nacionalnim sudovima zbog povrede prava EU o zaštiti konkurencije su novina u pravu unije. Zbog toga Sud EU do sada nije imao često prilike da se izjašnjava o standardima za utvrđivanje štete i o iznosima naknade u slučaju ovakvih povreda. Većina pitanja koja se mogu javiti prepuštena je za sada nacionalnom pravu država članica, što se vidi iz dispozitiva odluke u predmetu S-453/99 ***Karidž protiv Krijana*** (***Courage Ltd. v Crehan***) iz 2001. godine. Sud je prvo ustanovio ono što nije nigde bilo napisano: da pravo Unije nalaže državama članicama da omoguće pojedincima da traže naknadu štete zbog povrede prava o zaštiti konkurencije:

> "Puna delotvornost člana 85 Ugovora i naročito, praktično dejstvo zabrane iz člana 85, stava 1, bili bi ugroženi ukoliko svaki pojedinac ne bi mogao da zahteva naknadu štete koja mu je naneta ugovorom ili ponašanjem podobnim da ograniči ili ugrozi konkurenciju.
>
> U stvari, postojanje jednog takvog prava jača dejstvo pravila Zajednice o konkurenciji i obeshrabruje sklapanje sporazume i praksu, koji su često tajni i koji bi mogli da ograniče ili naruše konkurenciju. ..."

Zatim je konstatovao da u Uniji nema pravila koja bi regulisala pitanje naknade štete zbog povrede prava konkurencije, te da je zbog toga svaka država članica dužna da odredi nadležne sudove i da propiše procesna pravila za podnošenje takvih tužbi:

> "U odsustvu pravila Zajednice koja regulišu to pitanje, na domaćem pravnom sistemu svake od država članica je da odredi nadležne sudove i da propiše detaljna procesna pravila koja regulišu podnošenje tužbi za zaštitu prava pojedinaca koja neposredno proističu iz prava Zajednice,

[18] Zakon o upravnim sporovima, čl. 74.

pod uslovom da takva pravila ne budu nepovoljnija od onih koja se primenjuju na slične domaće tužbe (načelo ekvivalencije) i da ona ne čine praktično nemogućim, ili preterano teškim ostvarivanje prava koja im pruža pravo Zajednice (načelo efikasnosti)."

Ipak postoji izvesno ograničenje za nacionalne zakonodavce – ono je sadržano u već poznatim načelima ekvivalencije i efikasnosti. To su načela prava EU sa kojima procesna pravna sredstva predviđena u nacionalnom pravu moraju da budu usklađena kada je u pitanju ostvarivanje subjektivnih prava predviđenih u pravu Unije. Iz tog razloga će u ovakvim parnicama koje budu pokrenute pred sudovima u Srbiji biti manje prilike za nacionalni sud da primenjuje kriterijume tumačenja iz prava EU, jer oni za sada nisu još ni definisani. Ipak, Sud EU je u pomenutoj presudi proklamovao jedno pravilo koje bi moglo da nađe primenu i u domaćem sistemu. U predmetu ***Karidž protiv Krijana***, postavilo se pitanje da li tužilac koji je bio ugovorna strana u restriktivnom sporazumu može da traži naknadu štete koju je trpeo od ugovora podobnog da ograniči ili ugrozi kokurenciju. U konkretnom slučaju to je bio ugovor o dugoročnom zakupu jednog paba. Zakupodavac je bila firma IEL, a zakupac preduzetnik Krijan. IEL je bio vlasnik lanaca pabova koje je davao u dugoročni zakup. Jedan od suvlasnika IEL-a bila je pivara Karidž, koja je imala tržišni udeo od 19% na britanskom tržištu piva. IEL i Karidž su zaključili ugovor po kome su svi IEL-ovi zakupci dužni da kupuju pivo isključivo od pivare Karidž. Pivara je imala obavezu da isporučuje naručene količine piva po cenama iz cenovnika koji važe za pabove koje IEL daje u zakup. IEL je sa svojim zakupcima zaključivao formularne ugovore o zakupu koji su sadržali ovu obavezu isključive nabavke od Karidža (tzv. "pivski uslov"). Formularni ugovor je inače bio prijavljen Komisiji i ona je izrazila svoju nameru da odobri izuzeće na osnovu člana 85, stava 3 Ugovora. Godine 1993., Karidž je uložio pred engleskim sudom tužbu protiv Krijana za vraćanje duga od GBP 15.266,00 na ime neplaćenih isporuka piva. Krijan je osporio tužbeni zahtev kao neosnovan, navodeći da je pivski uslov u suprotnosti sa članom 85 Ugovora o osnivanju EZ. Takođe je uložio protivtužbu za naknadu štete. Krijan je tvrdio da je Karidž prodavao pivo pabovima po znatno nižim cenama od onih iz cenovnika koji je nametnut IEL-ovim zakupcima, vezanim pivskim uslovom. On je istakao je da je ovom razlikom u ceni umanjena profitabilnost zakupaca vezanih ovim uslovom, čime su dovedeni do bankrota.

Englesko pravo ne dozvoljava strani koja je zaključila nezakonit ugovor da zahteva naknadu štete od druge strane u tom ugovoru. Dakle, čak i ako bi g. Krijan uspeo u svojoj odbrani, i dokazao da je ugovor o zakupu koji je

zaključio suprotan članu 85 Ugovora, englesko pravu mu ne bi priznalo zahtev za naknadu štete.

Engleski apelacioni sud je pre nego što je uputio Sudu EU prethodno pitanje zauzeo stav da je član 85, stav 1 Ugovora o osnivanju EZ namenjen zaštiti trećih lica, bilo da su ona konkurenti ili potrošači, a ne zaštiti strana u zabranjenom ugovoru. Taj sud je doneo odluku da su ugovorne strane vinovnici, a ne žrtve ograničenja konkurencije. Međutim, engleski apelacioni je bio u dilemi, da li je u pravu, jer je bio svestan da je Vrhovni sud Sjedinjenih Američkih Država u predmetu ***Perma lajf*** (***Perma Life Mufflers v. Int'l Parts Corp***., 392 U.S. 134 (1968), doneo odluku da strana u ugovoru kojim se ograničava konkurencija, ako se nalazi u ekonomski slabijem položaju, ima pravo da tuži drugu ugovornu stranu za naknadu štete. Možda takvo pravilo treba da važi i u Evropskoj uniji? Stoga je engleski sud postavio Sudu EU pitanje da li je prepreka koja postoji po engleskom pravu za podnošenje zahteva g. Krijana za naknadu štete, u skladu sa pravom Zajednice.

Sud EU je odgovorio:

> "1. Strana u ugovoru koji je podoban da ograniči ili naruši konkurenciju, može da se pozove na kršenje odredaba o konkurenciji da bi dobila naknadu štete od druge ugovorne strane.
>
> 2. Suprotna je članu 101 UFEU odredba nacionalnog prava kojom se jednoj od strana u takvom ugovoru zabranjuje da traži naknadu štete.
>
> 3. Nije suprotna članu 101 UFEU odredba nacionalnog prava kojom se jednoj od strana u takvom ugovoru zabranjuje da se poziva na sopstvene nezakonite radnje da bi dobila naknadu štete, ***ako je utvrđeno da ta strana snosi značajnu odgovornost za narušavanje konkurencije***." (naglasak autora).

ZAKLJUČAK

Za primenu odredaba o konkurenciji iz Sporazuma o pridruživanju i Privremenog trgovinskog sporazuma postavljaju se određeni uslovi. Oni se definišu kao prekogranično dejstvo i osetno dejstvo sporazuma odnosno ponašanja koji su predmet postupka. Ukoliko su ti uslovi ispunjeni, domaći sudovi su u obavezi da primene ove odredbe na način na koji se pravo konkurencije primenjuje u Uniji. Način primene normi iz osnivačkih ugovora o konkurenciji propisan je uredbama EU. Pored uredbi značajan izvor predstavljaju i obaveštenja, smernice, saopštenja i drugi opšti akti Evropske komisije doneti u ovoj oblasti, kao i praksa Suda EU. Do primene pravila o konkurenciji doći će prevashodno u upravnim sporovima protiv rešenja

Komisije za zaštitu konkurencije i u građanskopravnim parnicama za naknadu štete.

Primena odredaba Sporazuma o stabilizaciji i pridruživanju o zaštiti konkurencije pred domaćim sudovima[19]

Rezime

Ovaj rad predstavlja autorizovano predavanje održano u Školi evropskog prava na Zlatiboru, 22. februara 2011. godine. Autor izlaže obaveze sudova u Republici Srbiji koje proističu iz člana 73 Sporazuma o stabilizaciji i pridruživanju i člana 38 Prelaznog trgovinskog sporazuma. Tim odredbama se na posredan način u Srbiju uvodi zabrana restriktivnih sporazuma iz člana 101 Ugovora o funkcionisanju EU i zabrana zloupotrebe dominantog položaja iz člana 102. Naime restriktivni sporazumi i zloupotreba dominantnog položaja suprotni su „pravilnom funkcionisanju ovih sporazuma" iz čega posredno proističe obaveza nadležnih organa u Srbiji da spreče zaključivanje takvih sporazume i takvo ponašanje preduzeća. Sporazumi i postupci privrednika koji su suprotni ovim odredbama od značaja su samo u meri u kojoj mogu uticati na trgovinu između Unije i Srbije. Prilikom ocene postupanja preduzeća nadležni organi u Srbiji dužni su da se rukovode pravilima konkurencije koja se primenjuju u Uniji. O načinu na u koji se pravo konkurencije primenjuje u Evropskoj uniji ne može se dovoljno saznati bez proučavanja prakse Suda Evropske unije i sekundarnih izvora kao što su uredbe, saopštenja, smernice i obaveštenja..

U prvom delu rada se definišu uslovi za primenu odredaba SSP/PTS – prekogranično i osetno dejstvo sporazuma - onako kako su tumačeni u praksi Suda. Zatim se ukratko navode najvažniji izvori (uredbe) koji sadrže kriterijume iz prava EU kojima treba da se rukovodi Komisija za zaštitu konkurencije. Glavna pažnja poklonjena je sudskoj kontroli sprovođenja pravnih normi o konkurenciji, u okviru upravnih sporova i u građanskopravnim parnicama za naknadu štete. Istaknuti su sledeći problemi na koje se može naići u sprovođenju obaveze iz SSP/PTS da se uzme u obzir pravo EU: kratak rok za donošenje odluke upravnog suda, nedostupnost

[19] Autorizovano predavanje održano u Školi evropskog prava na Zlatiboru, 22. februara 2011. godine.

uporednopravnih materijala, naročito na sprskom jeziku, nedovoljno poznavanje materije konkurencije kod starijih sudija, nepostojanje nadležnog organa kome bi domaći sud mogao direktno da se obrati za tumačenje normi SSP i PTS (i odredaba prava EU čiju primenu na osnovu tih sporazuma uzima u obzir), u slučaju da prilikom neposredne primene iskrsne pitanje tumačenja njihovih odredaba.

Ključne reči: primena prava EU, pravo konkurencije, sporazum o stabilizaciji i pridruživanju

Maja Stanivuković*

Application of Competition Rules of the Stabilization and Association Agreement by Serbian Courts

Abstract

This paper is an authorized lecture held in the European Law School, Zlatibor, on 22 February 2011. It treats the topic of the obligation of the courts in the Republic of Serbia to apply competition rules arising from Article 73 of the Stabilization and Association Agreement, and Article 38 o the Interim Agreement in accordance with the EU law criteria. By those provisions, the parties to the Agreements have indirectly incorporated Articles 101 and 102 of the Treaty on Functioning of the European Union into Serbian law. Restrictive agreements and abuse of dominant position are incompatible with the proper functioning of these Agreements. This means that the law enforcement authorities in Serbia (Commission for the Protection of Competition, and courts) are obliged to prevent the making and existence of such agreements, and such practice of undertakings. However, such agreements and practices are to be prevented pursuant to the Agreements, only insofar as they may affect trade between the Union and Serbia. When assessing practices of economic operators in relation to this provision the competent authorities in Serbia are bound to assess them on the basis of criteria arising from the application of the competition rules applicable in the Union. One needs to study the practice of the Court of the European Union

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and secondary sources, such as regulations, notices, communications and guidelines, in order to be informed of the manner in which the competition law rules are applied in the Union.

In the first part of the paper, the conditions for application of competition law provisions of the Agreements, i.e. cross-border effect and appreciable effect, are defined more closely on the basis of practice of the EU Court of Justice. This is followed by an outline of the most important sources (regulations) that contain criteria of EU competition law to be followed by the Serbian Commission for Protection of Competition. Main focus in the following section is on judicial review of the implementation of competition rules. This is effected in judicial review proceedings conducted before administrative courts, and in civil actions for damages conducted before civil courts. Several issues are identified as potential problems, as far as application of EU law criteria is concerned: short time-limits for rendering decisions on judicial review by administrative courts, lack of comparative law material, especially in Serbian translation, inadequate knowledge of competition law, particularly among older judges, non-existence of a competent authority to which the domestic courts could directly refer questions of interpretation of the provisions of the Stabilization and Association Agreement (and EU competition rules that are taken into account on the basis of the Agreement), in case such questions arise in the course of direct application of these provisions.

Keywords: application of EU law, Competition Law, Stabilization and Association Agreement

Revija za evropsko pravo: XIII (2011) 1.

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UDK: 339.142:368.212
pp. 65-94.

ENSURING THE CORRECT IMPLEMENTATION OF THE STABILISATION AND ASSOCIATION AGREEMENT IN SERBIA: A CASE STUDY ON THE IMPORTS OF SECOND-HAND VEHICLES

Keywords: European Union, Serbia, Stabilisation and Association Agreement, free movement of goods, industrial products, imports, custom duties and measures having equivalent effect, standstill clause, internal discriminatory or protective taxes, second-hand cars.

1. Introduction

Based on strong political conditionality, the European Union's Stabilisation and Association Process for the Western Balkans offers a framework for trade liberalization, financial assistance and new contractual relations in the form of Stabilisation and Association Agreements, an extensive part of which relate to internal market issues. The Stabilisation and Association Agreement (SAA) concluded between the European Communities and their Member States, on

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the one hand, and the Republic of Serbia, on the other, will in a few months' time enter into force.[1] An Interim Agreement on trade and trade-related matters has been in place since 1 February 2010.[2] Under the terms of the SAA, the parties have agreed to a progressive abolition of trade barriers so as to guarantee the free movement of goods between Serbia and EU Member States and thus gradually create a free trade area between them. Throughout the European integration process, the free movement of goods has been a challenging aspect of trade liberalization. It entails a huge amount of reforms aimed at the abolition of laws, administrative and other practises that hinder the free flow of goods, and the adoption of new legal and administrative measures which stimulate trade in products among the states entering this phase of economic integration. Trade liberalisation is a moving target, as states engaged in the process must be cautious not to enact new laws or create new practices which discriminate goods imported from states participating in the free trade area, for instance by levying duties or imposing taxes higher than those levied on similar domestic goods. Implementing the SAA obligations on the free movement of goods is not only an essential precondition for the future accession of Serbia to the European Union, it also represents a crucial element in the preparation of the Serbian market for the competitive pressures of the Union's internal market.

The purpose of this article is not to analyze the state of trade liberalization between the EU and Serbia. Rather, this paper offers a practical insight in the functioning of the SAA's chapter on the free movement of goods. It examines the limits imposed by the S AA on Serbia with regard to the taxation regimes applicable to the importation of second-hand cars from EU Member States, a practice with potentially big economic consequences considering the volume of used vehicles imported into Serbia from the European Union.[3] Potential

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[1] The SAA is available as document no. CE/SE/en on the website of DG Enlargement of the European Commission: http://ec.europa.eu/enlargement/pdf/serbia/key._docurnent/saa__.en.pdf. On 1 April 2011, seventeen EU Member States had ratified the SAA. With the entry into force of the Lisbon Treaty on 1 December 2009, the European Communities have ceased to exist. In this article, we therefore only speak of the European Union, except when reproducing names of or quotes from official documents which use the pre-Lisbon terminology and treaty numbering.

[2] ***Official Journal of the EU*** L 28, 30.1.2010, p. 2-397. For the scope of application, see infra section 2.2.

[3] See the annual statistical bulletins produced by the Customs Administration of the Republic of Serbia, available in Serbian and English at: http://www.carina.rs/

breaches of the Stabilisation and Association Agreement could materialise in the unjustified distinction posed by the tax regimes applicable to the importation of second-hand cars from the EU into the Republic of Serbia, on the one hand, and the domestic sale of (such) cars, on the other. In order to determine whether an infringement of SAA provisions really exists, this paper will first determine whether the Serbian tax provisions make a distinction between the import and sale of used vehicles as applied to second-hand cars originating in Serbia and in the EU (section 2). Before coming to a conclusion whether the perceived distinction does in fact breach the SAA (section 4), the paper will offset the analysis in section 2 with an examination of the relevant jurisprudence of the European Court of Justice on the taxation of second-hand vehicles imported from an(other) EU Member State (section 3). Arguably, the Court's case-law offers clear guidance for the Serbian authorities in their future Grafting and enactment of legal measures and administrative practices in the area of free movement of goods, as indeed more generally. As such, the case study on the taxation over used cars imported from the EU into Serbia offers an illustration of the need for the proper approximation of Serbia's and other (potential) candidate countries' existing legislation to that of the European Union and for the effective implementation of the former in one of the key operative areas of the SAA. By the same token, this article offers guidelines for members of the Serbian judiciary how to interpret and apply provisions of the Stabilisation and Association Agreement in contentious cases.

2. The taxation regimes over imported second-hand vehicles

2.1. The SAA regime on free movement of goods

The SAA aims to support the efforts of Serbia to strengthen its democracy, the rule of law and regional cooperation, and to complete the transition to a functioning market economy.[4] Like those of other Western Balkan countries, Serbia's reform agenda under the SAA is impressive, covering areas ranging from political dialogue, regional cooperation, justice and home affairs to the liberalisation of the flow of goods, services, workers and capital.[5] Through its

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cvr/lnformacije/Stranice/Statistika.aspx. Imports of second-hand cars were on the 4th place of imported goods 2010 and on the 3rd place for the years 2009 and 2008.

[4] See Article 1(2) of the SAA.

[5] See Y. Zahariadis, The Effects of the Serbia-EU Stabilization and Association Agreement:

provisions, its Annexes and Protocols, the SAA prescribes an asymmetric and gradual trade liberalization focused on different categories of products in favour of the associated country, i.e. Serbia. The liberalization of trade is set to occur on the basis of a pre-determined timetable, whereby custom duties, charges having equivalent effect, quantitative restrictions or measures having equivalent effect are to be abolished over a transitional period of maximum 6 years from the moment of the entry into force of the Agreement (cf. Articles 8 and 18 SAA). Apart the abolition of all tariff barriers, the SAA enshrines substantial provisions intended to produce non-tariff trade liberalization, such as those in the areas of competition, intellectual property, standards, and customs administration (cf. Articles 73, 75, 77 and 99 SAA).

2.2 The SAA in the Serbian legal order

According to Article 194 of the Serbian Constitution, international agreements ratified by the Republic of Serbia are binding and prevail upon the domestic legislation from the moment they enter into force. Thus, the SAA will be an integral part of the Serbian legal order from the moment it enters into force.[6] The Serbian legal order represents the monist constitutional system, by which international agreements become part and parcel of the domestic legislation and their binding force in the hierarchy of norms is below the Constitution and above laws and administrative acts. This means that the SAA as an international agreement ratified by the Serbian Parliament is binding from the moment it enters into force and that all existing and future domestic legislation should comply with it.[7]

The free movement of goods is enshrined in Title IV of the SAA and more specifically regulated in the annexes and protocols, which form an integral part of the Agreement. Free movement of industrial product is foreseen in Articles 19 to 23 of the SAA. With regard to the latter, the SAA singles out one specific category of products for which another regime than that of the SAA applies: products falling within the realm of the Treaty establishing the

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Economic Impact and Social Implications, ***ESAU Working Paper*** 17, Overseas Development Institute London, February 2007.

[6] See supra, note 1.

[7] See already S. Samardžić and D. Lopandić, 'Serbia and Montenegro', in A.E. Kellermann, J. Czuczai, S. Blockmans, A. Albi and W.Th. Douma (eds.), ***The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre-)Candidate Countries - Hopes and Fears*** (The Hague, T.M.C. Asser Press 2006), 143-177.

European Atomic Energy Community (cf. Article 19(2) SAA. For all other industrial products the trade liberalization prescribed by the SAA is as follows:

- from the date of entry into force of the Agreement, industrial products originating from Serbia will be imported into the EU:
  - free from custom duties and charges having an equivalent effect (Article 20(1) SAA);
  - without any quantitative restriction or any measures having an equivalent effect (Article 20(2) SAA);
- upon the date of entry into force of the SAA, industrial products originating from the EU will be imported into Serbia:
  - free from custom duties (Article 21(1) SAA), except for products listed in Annex l(a-c) of the SAA. The latter are products which are deemed sensitive for the Serbian economy (e.g. salt suitable for human consumption, petroleum gases and other gaseous hydrocarbons, various kinds of chemical substances, tubes, pipes, fittings, wires, cables and (semi-) precious stones and metals, soap, oils and shampoo) and their liberalization will be implemented progressively, according to the timetable mentioned in the Annex (Article 21(3) SAA);
  - free from charges having an equivalent effect (Article 21(2) SAA)
  - without quantitative restrictions or any measures having equivalent effect (Article 21 (4) SAA).

This legal framework is binding and shall apply to products originating in the EU or in Serbia listed in Chapters 25 to 97 of the Combined Nomenclature (Article 19 SAA). Chapter 87 of the Combined Nomenclature of Goods of 2011 classifies the different means of transportation, as well as their additional and functional parts. In this chapter, motor cars and other motor vehicles principally designed for the transport of persons, including station wagons and racing cars hold the code 8703. All the vehicles included under this list are classified as falling under a regime whereby duty rates will (generally) be reduced as follows:

a) on the date of entry into force of this Agreement, the import duty will be reduced to 70% of the basic duty;

b) on 1 January of the first year following the date of entry into force of this Agreement, the import duty will be reduced to 40 % of basic duty;

c) on 1 January of the second year following the date of entry into force of this Agreement, the remaining import duties will be abolished.[8]

In short, with the entry into force of the SAA the level of custom duties to the imports into Serbia of vehicles originating from the EU Member States will be quickly phased out. In fact, this work has already started prior to the effectuation of the timetables prescribed by the SAA. Since 1 February 2010, provisions of certain parts of the SAA, in particular those relating to the free movement of goods (Title IV) as well as Articles 73, 74 and 75 (and the Protocols), are put into effect by means of the Interim Agreement between the European Community and Serbia (Article 139 SAA).[9] While this system grants Serbia more time for the envisaged liberalization than the 6 years prescribed in Article 8 of the SAA, the duty of loyal implementation of the international agreements does already now pose limits on the customs and tax regimes upheld by the Serbian government. In fact, according to Article 72(2) SAA, the approximation process should have already started on the date of signing of the SAA, i.e. on 29 April 2008. This obligation is clearly reflected in the National Programme for Integration with the European Union (NPI), as adopted by the Government of the Republic of Serbia in October 2008.[10]

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[8] Annex I (a). It should be noted that Annexes I (b) and (c) gives specific customs codes and may therefore provide both the precise percentage reductions for import duties and different timetables used for the calculation of the customs rates. The same regimes apply to other vehicles, e.g. motor vehicles for the transportation often or more persons, including the driver (8702) and (heavier) motor vehicles for the transport of goods (8704).

[9] Law on Ratification of the Interim Agreement on trade and trade-related matters between the European Union, on the one side, and the Republic of Serbia on the other side, ***Official Gazette of Republic of Serbia*** No. 83/08.

[10] The NPI is available at http://kzpeu.seio.gov.rs/dokumenti/npi/npi october2008 en.pdf.

2.3. Serbian taxation regimes pertaining to imports and internal sales of used cars

2.3.1. Introduction

According to Article 5(1), point (8) of the Serbian Customs Law,[11] 'import duties' are custom duties and other charges having equivalent effect, which are paid when importing goods. The custom authorities have the competence to calculate and collect import duties and other duties, taxes and fees, unless otherwise determined by international agreement.[12] The duties that one should pay on the import of used vehicles from the EU into the Republic of Serbia are import duties and VAT. Both will be discussed in turn.

2.3.2. Import duties

Import duties on the importation of used motor vehicles in Serbia shall be determined on the basis of the customs tariff, regulated by the Customs Tariff Law,[13] which comprises the nomenclature of goods and customs rates. According to this law and the provisions laid down on the basis of this law, motor vehicles should be classified in the tariff heading 8703. Customs rate for all types of motor vehicles, except motor vehicles in unassembled state, is reduced from 20% to 12.5%. For the purpose of customs proceedings, customs authorities first have to determine the value of the good and then to apply the adequate custom rate. Serbian Customs Law provides that the customs value of the vehicle equals the transaction value,[14] if all conditions have been met. The customs authorities are authorized to estimate whether the conditions are fulfilled or not. If the customs authorities estimate that transactional value cannot be determined or that it does not fulfil the stipulated conditions and therefore is not acceptable, then the customs value will be the transactional

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11 Customs Law, ***Official Gazette of Republic of Serbia*** No. 18/10.

12 Article 16 and 17(1) of the Customs Law.

13 Customs Tariff Law, ***Official Gazette of the Republic of Serbia*** No. 62/2005, 61/2007 and 5/2009. Customs tariff nomenclature of goods, which is regulated by the Customs Tariff Law, is in compliance with the Combined Nomenclature of the European Union for the year 2011. See The Regulation on the Harmonization of the Custom Tariff Nomenclature for the year 2011. ***Official Gazette of the Republic of Serbia*** No. 90/2010.

14 According to Article 39 of the Customs Law, the transaction value is the actually price paid for the good, which will be taken into consideration by the customs authorities if it fulfils all stipulated requirements.

value of an identical good or similar good or the value which is determined by other methods provided by the Law.[15]

For the import of the used vehicles originating from the European Union, the rates of duties shall be determined in accordance with the dynamics of lowering the rates of duties provided for by the Interim Agreement. According to Article 21(1) and (2) SAA, customs duties on imports into Serbia of industrial products originating in the Community other than those listed in Annex I and charges having equivalent effect to customs duties shall be abolished upon the entry into force of this Agreement. Therefore, customs duties on imports into Serbia of used vehicles originating in the Community which are listed in Annex I(b) and Annex I(v) shall be progressively reduced and abolished in accordance with the following timetable:

- pursuant to Article 6 of the Interim Agreement and Annex I(b), for the vehicles classified under tariff codes 8703 22 10 90, 8703 22 90 00, 8703 23 19 90, 8703 23 90 00, 8703 32 19 90, 8703 32 90 00, duty rates will be reduced for the year 2011 to 40% of the basic duty (for the import of used vehicles: 12,5%), for the year 2012 to 20% of basic duty, and for the year 2013 the remaining import duties will be abolished.
- Furthermore, duty rates for the motor vehicles classified in Annex I(v) under tariff codes 8703 21 10 90, 8703 21 90 00, 8703 24 10 90, 8703 24 90 00, 8703 31 10 90, 8703 31 90 00, 8703 33 19 90, 8703 33 90 00, will be reduced for the year 2011 to 55% of basic duty, for the year 2012 to 40%, for the year 2013 to 20% and for the year of 2014 the remaining import duties will be abolished.

The following table shows duty rates on imports of motor vehicles into the Republic of Serbia for the year 20II.[16]

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[15] The methods of determining the customs value are provided in the Articles 39-45 of the Customs Law.

[16] See N. Petrović, ***Stope carine novih i polovnih putničkih motornih vozila*** [***Customs rate for new and used passenger motor vehicles***], Stručni komentar e-Press, Paragraf Lex 2009. The table is in compliance with the Regulation on the Harmonization of the Custom Tariff Nomenclature for the year 2011. 'Rate of duty' means the basic duty to which is referred above. 'IA EC 2011' means reduced duty rate in accordance with the Interim Agreement.

Tariff code	type	Rate of duty	IA EC 2011	Description
8703 21 10 90 8703 21 90 00	new used	12,5	6,9	Vehicles with spark–ignition internal combustion reciprocating piston engine of a cylinder capacity not exceeding 1000 cm3
8703 22 10 90 8703 22 90 00	New used	12,5	5	Vehicles with spark–ignition internal combustion reciprocating piston engine of a cylinder capacity exceeding 1000 cm3 but not exceeding 1500 cm3
8703 23 19 90 8703 23 90 00	new used	12,5	5	Vehicles with spark–ignition internal combustion reciprocating piston engine of a cylinder capacity exceeding 1500 cm3 but not exceeding 3000 cm3
8703 24 10 90 8703 24 90 00	New used	12,5	6,9	Vehicles with spark–ignition internal combustion reciprocating piston engine of a cylinder capacity exceeding 3000 cm3
8703 31 10 90 8703 31 90 00	New used	12,5	6,9	Other vehicles, with compression–ignition internal combustion piston engine (diesel or semi–diesel) of a cylinder capacity not exceeding 1 500 cm3
8703 32 19 90 8703 32 90 00	new used	12,5	5	Other vehicles, with compression–ignition internal combustion piston engine (diesel or semi–diesel) of a cylinder capacity exceeding 1500 cm3 but not exceeding 2500 cm3
8703 33 19 90 8703 33 90 00	new Used	12,5	6,9	Other vehicles, with compression–ignition internal combustion piston engine (diesel or semi–diesel) of a cylinder capacity exceeding 2500 cm3

According to Article 5(1), point 10, of the Customs Law, a debtor is every person which is liable to pay customs debt. However, the law provides for certain customs exemptions,[17] of which one should be emphasized in the light of the future application of the SAA. Article 216(1), point 1, of the Customs Law provides that Serbian nationals and foreign nationals with permanent residence in the Republic of Serbia are exempt from custom duties on items

[17] Articles 216-220 of the Customs Law.

inherited abroad (including motor vehicles). The Law on Foreigners[18] stipulates the conditions for granting a permanent residency in the Republic of Serbia to a foreigner.[19] For instance, the application of such provision upon the entry into force of the S AA could lead to a discriminatory regime against a foreigner with a temporary residence[20] in the Republic of Serbia who wants to import inherited used vehicle from an EU Member State, because he is not entitled to benefit from customs duty exceptions even though he constantly resides in the Republic of Serbia for a couple of years, but not yet fulfilled conditions for permanent residency permission. However, in this case, the customs authorities could grant the foreigner with temporary residence in the Republic of Serbia a customs duty relief for the temporary import of used vehicle.[21] The temporary import is a customs procedure whereby foreign goods are used in the country under the condition of re-export in an unaltered state, except of the regular depreciation of the goods due to their use. The goods that are temporarily imported shall be fully or partially relieved from the payment of customs duty, and shall not be a subject of commercial policy measures (foreign trade restrictions), unless it is provided otherwise by specific regulations.

2.3.3. VAT

2.3.3.1. General rules

In addition to customs duties, the import of used vehicles is subject to VAT, currently at a rate of 18%. Pursuant to Articles 3 and 7 of the Value Added

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[18] Law on Foreigners, ***Official Gazette of the Republic of Serbia***, No. 97/2008.

[19] According to Article 37(1) of the Law on Foreigners, permanent residency may be permitted to a foreigner: 1) who has stayed with no interruptions in the Republic of Serbia for at least five years on account of the permission for temporary residence before applying for permanent residence permit; 2) who has been married to a citizen of the Republic of Serbia, or a foreigner with permanent residence, for at least three years; 3) who is an underage person in temporary residence in the Republic of Serbia if one of his/her parents is a citizen of the Republic of Serbia or a foreigner with permanent residence, subject to the consent of the other parent; 4) who has ancestral links to the territory of the Republic of Serbia.

[20] Article 24 of the Law on Foreigners prescribes the types of stay of foreigners in the RS: 1) stay of up to 90 days, 2) temporary residence and 3) permanent residence.

[21] Article 325(1) point 1 of Regulation of customs-approved treatment for goods, ***Official Gazette of the Republic of Serbia***, No. 93/2010.

Tax Law imports of goods into the Republic of Serbia shall be liable to VAT.[22] 'Import of goods' means any entry of goods into the customs territory of the Republic of Serbia. The customs territory of the Republic of Serbia comprises the territory, territorial waters and airspace over Serbia.[23] Therefore, every entry of used vehicles into the Republic of Serbia is subject to taxation, except for certain types of imports that have been granted tax exemption. When it comes to imports of used vehicles, VAT shall according to Article 26 not be paid for the import of the following:

1) Entry of goods into the free zone, except the goods for end consumption in the free zone;
2) Goods and services intended to meet: a) official needs of diplomatic and consular representative offices; b) official needs of international organizations, if that is provided for by international contract; c) personal needs of expatriate staff of diplomatic and consular representative offices, including members of their families; d) personal needs of expatriate staff of international organizations, including members of their families, if that is provided for by international contract;
3) The goods exported and returned to the Republic unsold or not meeting the requirements from the contract, i.e. business relation under which they were exported;
4) The goods temporarily imported and then exported again in the course of the customs procedure, as well as the goods undergoing active refinement and following the disposal principle;
5) The goods temporarily imported and then exported again in an unaltered condition in the course of the customs procedure;
6) The goods for which refining under customs control has been granted in the course of the customs procedure;
7) Transit of goods in the course of the customs procedure; and

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[22] Value Added Tax Law, ***Official Gazette of the Republic of Serbia***, Nos. 84/04, 86/04 and 61/05.

[23] Article 5 of the Customs Law.

8) The goods for which customs storage has been granted in the course of the customs procedure.

In case of imports of used vehicles, pursuant to Article 19, the tax base shall be the goods' value determined under customs regulations, that shall also include the following: customs duties and other import duties, as well as other public revenues, except VAT and all secondary costs incurred until reaching the first destination in the Republic (the place indicated in the dispatch note or other transport document, and if not indicated, the place of the first transit of goods in the Republic).

When one considers that nearly every entry of used vehicles is subject to VAT taxation, then questions arise as to who is obliged to calculate and pay VAT, and whether the current tax regime in Serbia constitutes a discriminatory regime under the S AA.

2.3.3.2. Taxation regimes for imports and domestic sales of second-hand cars

Pursuant to Article 10(1) of the VAT Law, the tax debtor shall be the person who imports goods, whether it is a legal entity, entrepreneur or individual, foreigner or not. The tax debtor is liable to pay VAT, but the calculation of the amount due falls within the competence of the customs authorities. One should bear in mind that the import of used vehicles is by and large performed by a single person on an occasional basis. Thus, tax liability is neither related to the permanence of economic activity, nor to the performance of such activity. This means that • no matter who imported used vehicles, the customs authorities shall calculate VAT. According to Article 8, a 'taxpayer' shall be a person who independently and in the course of his/her activity performs a sale of goods or services. The activity referred to above, shall be any permanent activity of a manufacturer, salesman or service provider for the purpose of gaining income, including the activities such as: exploitation of natural resources, agriculture, forestry and independent activities. A taxpayer shall also be considered to perform activities within a business unit. Moreover, a taxpayer shall be a person on behalf and for the account of whom services are rendered, or goods are delivered, and a person who renders services or delivers goods, on his own behalf and for the account of another person. Furthermore, Serbian governmental bodies, bodies of territorial autonomy and local self-government, as well as legal entities legally founded for the purpose of performing government activities, shall be considered as taxpayers if they

perform sales of goods and services outside the body's activities or outside the government activities, taxable in accordance with this Law (Article 9).

Since the VAT is a consumption tax, the tax burden should be borne ultimately by the final consumer. Having this in mind, a taxpayer is not considered as a final consumer because he is entitled to deduct from his VAT liability the input tax - the VAT amount paid at the moment of importation, if he fulfils all the conditions set by the Law. Despite this general rule, when importing passenger vehicles, a tax payer is not entitled to deduct input tax, unless he performs the following activities: 1) sale and renting of the vehicle; 2) transportation of passengers and goods; or 3) driver training.[24] In addition to this provision, it is stipulated that the sale of passenger cars for which at the time of purchase the VAT taxpayer did not enjoy the right for deduction of input tax fully or proportionally is not subject to VAT.[25] This provision abolishes the possibility of double taxation that may otherwise arise in this case. Therefore, if a taxpayer imports passenger cars which are needed for the performance of his economic activity other than one of the above-mentioned activities, he will bear the VAT tax burden as a final consumer, although he would be entitled, under the general rule, to deduct the input tax.

To conclude, a taxpayer that uses imported passenger cars exclusively for the aforementioned activities does not bear the VAT tax burden, while other taxpayers and other tax debtors are considered as a final consumers and thus do face the VAT tax burden.

2.3.3.3. Further legal classification

In order to get a complete picture of the treatment of imported used vehicles, it should be compared with the treatment of internal trade of used vehicles. It is worth pointing out still that the supply of used vehicles (hereinafter: sales of used vehicles) carried out by a taxpayer in the Republic of Serbia in return for a compensation and in the course of performing activities, shall be liable for payment of VAT.[26] Also, the 'transfer tax on absolute rights' shall be paid

[24] Articles 27-29 of the VAT Law.

[25] But it is subject to the Tax on Transfer of Absolute Rights (see infra, section 2.3.3.3).

[26] Article 3(1) point 1 of the Value Added Tax Law.

on the transfer against compensation of property rights in relation to a second-hand motor vehicle.[27]

1. Pursuant to the VAT Law, a special tax regime is provided for the taxpayers that are dealing with sales of used vehicles. According to Article 36, they shall assess the tax base as a difference between the selling and purchase price of the goods (hereinafter: taxation of difference), with deduction of VAT included in that difference. It should be noted that this base shall be applied if, at the time of acquisition of the goods, the supplier was not liable for VAT or used taxation of the difference referred above. In this case the taxpayer shall not be entitled to state the VAT in the invoices or other documents, or to deduct the input tax. Therefore, if the supplier was liable to VAT and did not use the taxation of the difference, the general rule is applicable. Moreover, the use of motor vehicles is subject to 'tax on the use of motor vehicles' according to the Law on Tax on the Use, Possession and Carrying of Goods.[28]

2. Transfer of property rights in relation to second-hand motor vehicles is liable for tax on the transfer of absolute rights carried out in the territory of the Republic of Serbia under a tax rate of 2.5%. For the purpose of this Law, 'second-hand motor vehicle' means a motor vehicle, which had been registered at least once in the territory of the Republic of Serbia in conformity with regulations.[29] The person who pays the tax on the transfer of absolute rights shall be the seller or transferor of the rights referred to above. The tax base shall be the market value of transferred second-hand motor vehicles as determined by the competent tax office. Tax exemptions are provided for the transfer against compensation of special motorcars with built-in devices for transporting patients, special driving school motorcars with dual controls and motorcars for taxi and rent-a-car service specially marked as such.

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[27] Article 23(1) point 4 of the Property Tax Law (***RS Official Gazette***, Nos. 26/01, 45/02, FRY Official Gazette, No. 42/02, RS Official Gazette, Nos. 80/02, 135/04, 61/07, 5/09, 101/2010). According to Article 24a of the Property Tax Law, 'transfer against compensation' shall not be understood as the transfer of an absolute right on which the value-added tax is payable pursuant to the law governing the value-added tax.

[28] Law on Tax on the Use, Possession and Carrying of Goods, Official Gazette of the Republic of Serbia, Nos. 26/01,80/02,43/04, 132/04, 112/05, 114/06, 118/07, 114/08, 31/09 and 101/2010.

[29] Article 14(5) of the Property Tax Law.

3. According to Article 2 of the Law on Tax on the Use, Possession and Carrying of Goods, a tax on the use of motor vehicles shall be paid annually at the registration of the motor vehicle, including passenger cars. The notion 'passenger car' shall according to the regulations governing road safety be considered as meaning a vehicle used for passenger transport which has no more than nine seats including the driver's seating position. Under this Law, a 'tax payer' is a legal or physical person on whose name the vehicle will be registered, unless otherwise provided by the law. Therefore the provisions do not make a distinction between imported used vehicles and used vehicles already registered in the domestic market. Article 4 of the Law prescribes that tax shall be paid according to engine capacity of passenger cars. The amounts for 2011 are the following:[30]

1) up to 1150cm3- 950 dinars
2) over 1150 to 1,300 cm3 -1,860 dinars
3) over 1,300 to 1,600 cm3 - 4,110 dinars
4) over 1,600 to 2,000 cm3 - 8,430 dinars
5) over 2,000 to 2,500 - 41,630 dinars
6) over 2,500 to 3,000 - 84,370 dinars
7) over 3,000 cm3 - 174,370 dinars

The prescribed amount of tax on the use of the motor vehicles shall be reduced to vehicles over the age of five years of age, for:

1) 15% - for vehicles over five to eight years of age;
2) 25% - for vehicles over eight to ten years of age;
3) 40% - for vehicles over ten years of age.

Notwithstanding the mentioned provision, for passenger cars of more than 20 years of age, the tax on the use of motor vehicles shall be 20% of the prescribed amount of taxes on motor vehicles. Pursuant to Article 5(3) of the Law, the prescribed amount of the tax on the use of motor vehicles, in

[30] The amount of tax is provided for the year 2011 and is adjusted with a growth rate of retail prices for the previous twelve month, according to Article 27a of the Law on Tax on the Use, Possession and Carrying of Goods. At the time of writing, the exchange rate was approximately 1 EUR = 103 dinars.

addition to reductions in accordance with Article 4 of this Law, shall be further reduced by 50% for passenger vehicles that perform taxi services and for special passenger vehicles for driver training with dual controls.[31]

2.3.4. Conclusion: discriminatory regimes

On the basis of the preceding overview, the following picture emerges:

I

Public revenue to be paid when importing used vehicles amount to:

1) A customs duty (hereinafter: CD) at a rate of 6,9% or 5%, until its abolition pursuant to Interim Agreement; and
2) VAT at a rate of 18%[32]
   - VAT taxpayer performing stipulated activities is not treated as a final consumer
   - VAT taxpayer not performing stipulated activities is bearing a tax burden (treatment of a final consumer)
   - a tax debtor other than a VAT taxpayer is bearing a tax burden (treatment of a final consumer)
3) A tax on the use of motor vehicles which is paid with the registration of the motor vehicle (hereinafter: TU)

II

Public revenue to be paid on the sale of imported used vehicles (I) in the Republic of Serbia:

1) If the taxpayer referred to above under point I.2(a) sells an imported used vehicle, he is entitled to deduct the input tax from his VAT liability. He does not bear a VAT tax burden. (His burden I+II = CD+TU)

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[31] Alongside with the tax reductions, the Law provides tax exemptions that, in view of the scope of the current analysis, have not been mentioned.

[32] The tax base includes customs duties and other import duties, as well as other public revenues, except VAT and all secondary costs incurred until reaching the first destination in the Republic of Serbia.

2) If the taxpayer referred to above under point I.2(b), sells an imported used vehicle, he is paying tax on the transfer of absolute rights (hereinafter: TTAR) carried out in the territory of Republic of Serbia at a tax rate of 2.5%, because it is stipulated that the sale of passenger cars for which at the time of purchase the VAT taxpayer did not have the right to deduct input tax fully or proportionally is not subject to VAT. (His burden I+II = CD + VAT 18% + TU + TTAR 2.5%)

3) If a tax debtor other than the VAT taxpayer referred to above under point I.2(v) sells an imported used vehicle, he is obliged to pay a tax on the transfer of absolute rights at a rate of 2.5%. (His burden I+II = CD + VAT 18% + TU + TTAR 2.5%)

For internal sales of used vehicles there are two possibilities:

1) A VAT taxpayer should pay VAT with a right to deduct it from his VAT liability or use taxation of difference with deduction of VAT included in that difference.

2) A non-VAT taxpayer is obliged to pay TTAR 2.5% (in case of importation of used vehicles he will pay CD + VAT 18%). Moreover, having in mind that the imported used vehicle is considered as new, because it has never been registered in the Republic of Serbia, when selling the unregistered imported used vehicle (after paying CD + VAT 18%) he would not be obliged to pay any tax (because the subject of taxation of TTAR is a second-hand vehicle and not new one).

In short, one can conclude that, even though the black letter of the Serbian tax regulation does not distinguish between treatment of used vehicles in relation to its origin and treatment of foreign and domestic taxpayer, it nevertheless in practice imposes a heavier tax burden on imported used cars. The question then arises whether this distinction is justified under the rules and obligations imposed on Serbia under the Interim Agreement and, ultimately, the Stabilisation and Association Agreement.

Before jumping to a conclusion on this matter, it is instrumental to examine the relevant jurisprudence of the European Court of Justice applicable to the taxation of second-hand vehicles imported from an(other) EU Member State, especially those judgments rendered in similar (pre-)accession contexts. This jurisprudence is mutatis mutandis applicable to the SAA. By virtue of the integral character of the agreement in the legal order of the European

Union,[33] the Serbian authorities and judiciary cannot afford to implement the agreement in a different fashion.

3. ECJ case-law concerning taxation of imported second-hand vehicles

3.1. Guiding principles

In the ***Brzenzinzski*** case the Court reiterated the purpose of Article 90 TEC (now Article 110 TFEU):

> "Its aim is to ensure free movement of goods between the Member States in normal conditions of competition by the elimination of all forms of protection which may result from the application of internal taxation that discriminate against products from other Member States (Joined Cases C-393/04 and C-41/05 ***Air Liquide Industries Belgium*** [2006] ECR 1-5293, paragraph 55, and the case-law cited, and ***Nädasdi and Nemeth***, paragraph 45).
>
> As far as the taxation of imported second-hand vehicles is concerned, the Court has also held that Article 90 EC seeks to ensure the complete neutrality of internal taxation as regards competition between products already on the domestic market and imported products (see Case C-387/01 ***Weigel*** [2004] ECR 1-4981, paragraph 66, and the case-law cited)."[34]

In line with the guiding principles of non-discrimination and the non-protective nature of Article 110 TFEU, the Court has consistently held that a Member State is not prohibited from levying a vehicle tax on the first registration of a vehicle in that Member State, provided that products originating from other Member States are not charged in excess of the taxes imposed on similar domestic products.[35] Advocate General Sharpston in ***Brzezinski*** held that:

> "It may be distilled from that case-law that, in order to be compatible with the first paragraph of Article 90 EC, a national tax levied once only on

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[33] As provided by the ECJ in relation to international agreements concluded by the European Community: Case 181/73 ***Haegeman*** [1974] ECR449 and Case 104/81 ***Kupferberg*** [1982] ECR 3641.

[34] Case C-313/05 ***Brzezinski v Dyrektor hby Celnej w Warszawie*** [2007] ECR 1-513, paragraphs 27 and 28.

[35] See case C-345/93 ***Fazenda Publica and Ministerio Publico v America Joäo Nunes Tadeu*** [1995] ECR 1-479.

each vehicle, on its first registration in a Member State, must, in so far as it affects second-hand vehicles, be calculated in such a way as to avoid any discrimination against such vehicles from other Member States. Such a tax must therefore not impose on imported second-hand vehicles a burden which exceeds the burden of residual tax included in the cost of an equivalent vehicle first registered in the same Member State at an earlier stage in its existence".[36]

So the first point to be taken into consideration when the Serbian authorities introduce a tax for imported second-hand vehicles is that it should be imposed without distinction, irrespective of the origin of the cars (limited, of course, to the parties to the SAA). However, the same question arises: with which category of products should the comparison with the level of the tax be made, since Serbia is not (i.e. no longer) a manufacturer of vehicles?[37]

Here, the judgment of the Court in ***Commission v Denmark*** is instructive.[38] The case concerned a tax registration on imported second-hand vehicles in Denmark, a country which does not manufacture its own brand of vehicles. The tax registration was calculated on the basis of a flat-rate taxable value. The tax base of imported used vehicles was equal to 100% of the price of the new vehicle in case it was less than six months old, and 90% of that price when more than six months old. On the other hand, the sale of vehicles already registered in Denmark did not give rise to payment of a further registration duty. Since the tax was manifestly of a fiscal nature and was charged not by reason of the vehicle crossing the frontier of the Member State which introduced the charge, but upon first registration of the vehicle in the territory oft hat state, the charge had to be regarded as part of a general system of internal dues on goods and thus examined in the light of Article 95 EEC (later Article 90 TEC, now Article 110 TFEU).[39] Both the Danish authorities and the European Commission agreed in this respect. Yet, the Danish authorities claimed that there was no violation of Article 95 EEC and that there no real discrimination existed in favour of Danish products, since

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36 Paragraph 11 of the Opinion.

37 When Fiat took over the Zastava plant in Kragujevac, the last of the Serbian car manufacturers disappeared.

38 Case 47/88 ***Commission v Denmark*** [1990] ECR 1-4509.

39 See also Case C-383/01 ***De Danske Bilimportører v Skatteministeriet, Told- og Skattestyrelsen*** [2003] ECR I-6065.

Denmark did not produce cars and that thus all used cars were of foreign origin. The Court decided differently:

> "It must be observed at the outset that, as the Commission has correctly observed, the fact that there is no Danish production of motor vehicles does not signify that Denmark has no used-vehicle market. A product becomes a domestic product as soon as it has been imported and placed on the market. Imported used cars and those bought locally constitute similar or competing products. Article 95 therefore applies to the registration duty charged on the importation of used cars."[40]

While the Serbian market of second hand vehicles is structured in a similar fashion as the one described above, the Serbian "Tax on the use of motor vehicles" is to be paid annually by any "legal or physical person on whose name the vehicle will be registered". While Serbian law does therefore not apply higher tax rates on imported used vehicles than on similar used vehicles which have been already registered on the domestic market, it nevertheless in practice imposes a heavier tax burden on imported used cars.[41] The question thus still remains whether this distinction is justified under the rules and obligations imposed on Serbia under the Interim Agreement and, ultimately, the Stabilisation and Association Agreement. According to settled case-law of the European Court of Justice, Article 110(1) TFEU is infringed when the tax charged on the imported product and that charged on a similar domestic product are calculated in a different manner on the basis of different criteria which lead, if only in certain cases, to higher taxation being imposed on the imported product.[42]

3.2. Tax rates and impediments to free movement of goods

With regard to tax rates it must be noted that as long as taxes imposed indiscriminately on domestic and imported products, even very high tax levels are compatible with EU law. The European Court of Justice has ruled in ***Commission v Denmark*** that Article 95 EEC (now Article 110 TFEU) does not serve to censure the excessiveness of taxation levels and that Member States

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[40] Case 47/88 ***Commission v Denmark*** [1990] ECR 1-4509, paragraph 17.

[41] See our conclusions in Section 2.3.4, supra.

[42] See Case C-313/05 ***Brzezinski v Dyrektor hby Celnej w Warszawie*** [2007] ECR 1-513, paragraph 40 and the case-law cited therein (***Haahr Petroleum***, paragraph 34, and Case C-375/95 ***Commission v Greece*** [1996] ECR 1-5981, paragraph 29).

can set the tax rates at the levels they see fit.[43] In the ***Bergandi*** case the Court gave a wide interpretation to the concept of excessiveness of tax rates according to Article 95 EEC:

> "As the court held in its judgments of 27 February 1980 (case 168/78 ***Commission v France*** [1980] ECR 347; case 169/78 ***Commission v Italy*** [1980] ECR 385; and case 171/78 ***Commission v Denmark*** [1980] ECR 447), within the system of the EEC Treaty, Article 95 supplements the provisions on the abolition of customs duties and charges having equivalent effect. Its aim is to ensure free movement of goods between the member states in normal conditions of competition by the elimination of all forms of protection which may result from the application of internal taxation that discriminates against products from other member states. Thus Article 95 must guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products. The Court stated in the same judgments that Article 95 ***must be interpreted widely so as to cover all taxation procedures which, directly or indirectly, conflict with the principle of equality of treatment of domestic products and imported products; the prohibition contained in that article must therefore apply whenever a fiscal levy is likely to discourage imports of goods originating in other member states to the benefit of domestic production***."[44]

The Court reiterated its position in the early ***Stier*** judgment and applied it even to cases in which no similar or competitive domestic products existed to the ones imported:

> "(...) Article 95 does not prohibit Member States from imposing internal taxation on imported products when there is no similar domestic product or other domestic product capable of being protected. (...) Nevertheless it ***would not be permissible*** for them to impose on products which, in the absence of comparable domestic production, would escape from the application of the prohibitions contained in Article 95, ***charges of such an amount that the free movement of goods within the common market would be impeded as far as those products were concerned***. "[45]

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[43] Case 47/88 ***Commission v Denmark*** [1990] ECR 1-4509, paragraph 10.

[44] Case 252/86 ***Bergandi*** [1988] ECR 1343, paragraphs 24 and 25 (emphasis added).

[45] Case 31/67 ***Stier*** [1968] ECR 235, paragraph 21.

Furthermore, in order to assess the compatibility of a given tax with the second paragraph of Article 95 EEC, it was necessary to determine "whether or not the tax is of such a kind as to have the effect, on the market in question, of reducing potential consumption of imported products to the advantage of competing domestic products."[46] For the second paragraph of Article 95 EEC to apply, it was not necessary that protective effect should be shown statistically; it was sufficient if it were shown "that a given tax mechanism is likely, in view of its inherent characteristics, to bring about the protective effect referred to by the Treaty."[47]

3.3. The basis for assessment and the rules for levying the tax

According to well-established case-law of the Court it follows that "in order to apply Article 95 of the [EEC] Treaty, not only the rate of direct and indirect internal taxation on domestic and imported products but also the basis of assessment and detailed rules for levying the tax must be taken into consideration."[48] As a rule, the Treaty is violated "where the taxation on the imported product and that on the similar domestic product are calculated in a different manner on the basis of different criteria which lead, if only in certain cases, to higher taxation being imposed on the imported product."[49] However, states may impose differential taxation on similar, yet different, products on the basis of objective criteria in pursuit of objectives compatible with EU law. In principle, it is not contrary to EU law for a Member State to levy registration taxes on motor vehicles the amount of which may differ depending on objective criteria - like the type of fuel used, emission standards or in some cases engine capacity, when this differentiation aims at encouraging the purchase of less polluting cars and preserving the environment, provided of course that Article 110 TFEU is respected. In the absence of harmonizing measures at the EU level, Member States are free to distinguish among different levels of pollution for the purposes of car registration tax and thus set the tax level as they see fit.[50]

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[46] Case 356/85 ***Commission v Belgium*** [1987] ECR 3299, paragraph 1.

[47] Case 170/78 ***Commission v United Kingdom*** [1980] ECR 417, paragraph 10.

[48] Cas-3 74/76 ***Iannelli v Meroni*** [1977] ECR 557, paragraph 21.

[49] Case 20/76 ***Schoettle v Finanzamt Freudenstadt*** [1977] ECR 247, paragraph 20.

[50] Illustrative is Petition 0331/2007 before the European Parliament, by Mr loan Päun Cojocariu (Romanian), on problems with the registration in Romania of a vehicle

In a string of cases, the Court decided that a registration tax paid on a new vehicle forms a part of its market value and that Member States must take the car's actual depreciation value into account when calculating the registration tax.[51] In ***Commission v Denmark***, the defending Member State was condemned for applying to imported used cars an assessment rate of 90%, thereby limiting the depreciation to 10%, irrespective of the age or condition of the vehicle. In the Court's view, the levying of a registration duty for which the basis of assessment is at least 90% of the value of a new vehicle constitutes a manifest surcharge of such vehicles in comparison with the residual registration duty to be paid for previously registered second-hand cars bought on the national market, whatever their age or condition.[52] In ***Gomes Valente***, the car tax varied according to the cylinder capacity and was assessed in accordance with the tables annexed to the Decree-Law in which the calculation of the tax was enshrined.[53] The Court found that the Portuguese legislation in force at the material time was calculated without taking the vehicle's actual depreciation into account:

> "The first paragraph of Article 95 of the [EEC] Treaty does not permit a Member State to apply to second-hand vehicles imported from other Member States a system of taxation in which the depreciation in the actual value of those vehicles is calculated in a general and abstract manner, on the basis of fixed criteria or scales determined by a legislative provision, a regulation or an administrative provision, unless those criteria or scales are capable of guaranteeing that the amount of the tax due does not

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bought in Germany. This Romanian gentlemen had bought a 2000 Seat Ibiza in Germany, but when trying to register it in Romania he was asked to pay a high registration fee as the Romanian authorities considered that the vehicle only met the EURO 2 standards and not the EURO 4 ones as specified in its German identity card. The petitioner wondered if, indeed, there was a difference between Romania and Germany as regards the setting of pollution standards of vehicles. He considered himself a victim of an abuse designed to have him pay a higher registration tax and requested the European Parliament to look into his case.

[51] See case 47/88 ***Commission v Denmark*** [1990] ECR 1-4509; case C-345/93 ***Fazenda Publica and Ministerio Publico v America João Nunes Tadeu*** [1995] ECR 1-479; and case C-375/95 ***Commission v Greece*** [1997] ECR 1-5981.

[52] Case C-47/88 ***Commission v Denmark*** [1990] ECR 1-4509, paragraph 20.

[53] Case C- 393/98 ***Ministem Publico and Gomes Valente v Fazenda Publica*** [2001] ECR 1-1327.

exceed, even in a few cases, the amount of the residual tax incorporated in the value of similar vehicles already registered in the national territory."[54]

In this ruling the ECJ established two general points to judge if a system of taxation of imported used vehicle is compatible with Article 95 EEC (now Article 110 TFEU):

- the degree of precision with which the fixed scale reflects the actual depreciation of the vehicle; and
- the opportunity for the owner of an imported second-hand vehicle to bring an action challenging the application to his vehicle of a scale based on general criteria.

Regarding the first point, apart from the age of the car, other factors of depreciation, such as the brand, the model, the mileage, the method of propulsion, the mechanical state or the state of maintenance of the vehicle, is likely to result in the fixed scale reflecting the actual depreciation of vehicles much more precisely and permits the aim of ensuring that the tax charged on imported second-hand vehicles does not in any case exceed the amount of the residual tax incorporated in the value of similar second-hand vehicles already registered in the national territory to be achieved much more easily.[55]

Regarding the second point, referring to its judgment in ***Lütticke v Hauptzollamt Saarlouis***,[56] the Court held that even when the system to evaluate the depreciation is imprecise, the system of taxation might still be compatible with the Treaty, if the owner of an imported vehicle had an opportunity to challenge the application of that scale to his vehicle before a court, which would prevent any possible discriminatory effects of a system of taxation based on such a scale.[57]

In its judgment in ***Commission v Greece***, the ECJ held that by applying a single criterion of depreciation (based on age) for the purpose of determining the taxable value of second-hand vehicles transferred from another Member State into Greece in order to establish the registration tax, and by adopting a

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[54] ***Ibid***., paragraph 44.

[55] Ibid., paragraph 28.

[56] Case 57/65 ***Lütticke v Hauptzollamt Saarlouis*** [1966] ECR 205.

[57] Case C-345/93 ***Fazenda Publica and Ministerio Publico v America João Nunes Tadeu*** [1995] ECR 1-479.

reduction in value which may lead, even if only in certain cases, to a discrimination of second-hand cars from other Member States, Greece failed to fulfil its obligations under Article 90 TEC (now Article 110 TFEU).[58]

Also in its judgement in ***Nadasdi***, the Court held that certain provisions of the Hungarian legislation on registration taxes, in its version in force between 1 May 2004 and 31 December 2005, were contrary to Article 90 TEC, in that the tax was calculated without taking into account the true depreciation of second-hand vehicles.[59] The tax applied to second-hand vehicles from other Member States exceeded the residual tax incorporated in the value of similar used vehicles already registered in Hungary. Hungary introduced, following the judgment in ***Nadasdi***, the individual tax assessment procedure which provides the importer with the option of requesting a case-by-case assessment of the car registration tax of his vehicle, taking account of its individual features.[60]

In neither of these judgments, nor in Commission v Hungary, did the Court rule that the national authorities were obliged to assess imported used cars individually. It does not follow from those judgments that Article 110 TFEU requires that Member States evaluate on the basis of an individual assessment of the value of imported used cars. Advocate General Fennelly stated in his opinion on ***Gomes Valente***, that Member States may adopt general criteria for assessing the amount of car tax due on the importation of used vehicles, on condition that these are such as to guarantee that this amount does not exceed, even if only in certain cases, the residual tax in comparable vehicles on the domestic market:

> "It is inherent in the recognition by the Court of the direct effect of the first paragraph of Article 95 [EEC] that an individual should be able to challenge the scale for the assessment for tax on his imported used car. I should add that the practical difficulties of determining precisely the value of an individual used car do not preclude Member State authorities' relying as a guideline on average values of used cars recognised as such

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58 Case C-74/06 ***Commission v Greece*** [2007] ECR 1-7585.

59 Joined cases C-290&333/05 ***Nadasdi*** [2006] ECR 1-10115.

60 European Commission, press release no. IP/09/1643, 29 October 2009.

in the domestic market, subject to the requirements of Article 95 referred to above."[61]

The Court, when rendering judgment in this case, followed AG Fennelly's rationale.[62] So, in order for the Member State to set the general criteria for calculating the value of the tax, it should borne in mind that those criteria should reflect the real depreciation value of the used car, to escape the scope of discriminatory taxation.

3.4. Objective justification (imperative requirement)

General objective justification used by the national authorities in the cases referred to above are: (i) the protection of the environment; ii) the necessity to avoid illegal practices in the price declaration of second-hand vehicles; iii) to necessity to restore equal treatment qua pricing between domestic and imported second-hand vehicles; iv) roadworthiness test. We will now deal with each of these issues in turn.

3.4.1. The protection of environment

In the ***Brzezinski*** case, Advocate General Sharpston opined that the objective justification at hand, i.e. the protection of the environment, should be accepted only if it passes the test of proportionality and non-discrimination: "A tax does not escape that prohibition simply because, in addition to its fundamental purpose of raising revenue, it seeks to favour environmentally-friendly products or habits. On the contrary, if it pursues such an aim, it. must do so in a manner which does not burden domestic products less than those imported from other Member States."[63] Following this rationale, the ECJ stated that it is settled case-law that a system of taxation may be considered compatible with Article 90 TEC (now Article 110 TFEU) only if it is so arranged so as to exclude any possibility of imported products being taxed

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[61] Opinion of Mr Advocate General Fennelly delivered on 21 September 2000 in Case C-393/98 ***Gomes Valente***.

[62] Case C-393/98 ***Ministerio Publico and Antonio Gomes Valente v Fazenda Publica*** [2001] ECR 1-1327, paragraphs 20 and 21.

[63] Case C-313/05 ***Brzezinski v Dyrektor Izby Celnej w Warszawie*** [2007] ECR1-513, paragraph 53.

more heavily than similar domestic products, so that it cannot in any event have discriminatory effect.[64]

3.4.2. The roadworthiness test

Member States may require, as part of the car registration procedure, a roadworthiness test, the objective of which is to verify - for purposes of protecting the health and life of humans, that the specific motor vehicle is actually in a good state of repair at the moment of registration.[65] However, the ECJ has ruled that a roadworthiness test is contrary to the Treaty, if, in same circumstances, it is not required for the vehicles of a national origin. The test can be justified on the basis of the Article 30 of the TEC (now Article 36 TFEU) if the imported vehicle has been in use in another Member State before the registration. Then the test has to be done in similar conditions without distinction between national origin and imported vehicles.[66]

Apart from the non-discrimination and the mutual recognition principle that the roadworthiness testing procedure should respect in order not be contrary to the Treaties, the Commission is of the opinion that it must also concern a test that is readily accessible and can be completed within a reasonable time. To restrict roadworthiness testing for imported vehicles to specific and separately designated control stations can constitute an obstacle to trade between Member States.[67]

3.4.3. The under-declaration problem

As considered above, there will be a breach of Article 110 TFEU if the scale of depreciation of the car does not reflect the real value of it. Member States apply different methods in order to find an evaluation system which is in compliance with the Treaty. The Polish administration in ***Brzezinski*** had chosen the system of reference in order to calculate the tax basis, similar with

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64 Ibid., paragraph 40.

65 Communication from the Commission, "Interpretative communication on procedures for the registration of motor vehicles originating in another Member State", SEC(2007) 169 final, Brussels, 14 February 2007.

66 See Case 50/85 Bernhard Schloh v Auto controle technique SPRL [1986] ECR 1855.

67 Communication from the Commission, "Interpretative communication on procedures for the registration of motor vehicles originating in another Member State", SEC(2007) 169 final, Brussels, 14 February 2007, at 9.

the Serbian situation so far. The Polish argument for using the reference system, and not the price of the purchase of the second-hand vehicle, was because of the belief (or rather suspicion) that in many if not all cases the purchase price declared to the authorities was significantly less than the actual price paid. According to the Polish government this justified a higher duty, so as to compensate for its presumed declaration at an artificially low level. Both the Advocate General and the Court refused to accept this argument as a reasonable and proportional one.[68]

It is of course quite possible that the problem of under-declaration exists, in the absence of any means of verifying the true price paid. To deal with that problem, however, it is necessary to find an objective means of assessing the true value of vehicles, or at least a good approximation ofthat value which may, if appropriate, be challenged.

3.4.4. The equality of prices

In ***Gomes Valente*** the Portuguese government argued at the hearing that the system of taxation of imported second-hand cars was in fact intended to restore equality of treatment in principle between the commercial value of domestic second-hand vehicles and that of imported second-hand vehicles. The Court did not accept that argument. A national tax system which is liable to eliminate a competitive advantage held by imported products over domestic products would be manifestly incompatible with Article 90 TEC (now Article 110 TFEU), which seeks to guarantee that internal charges have no effect on competition between domestic and imported products.[69]

4. Concluding remarks

Serbia is making progress on the path towards future accession to the European Union. The road map of its success is drawn up for an essential part by the timely and correct implementation of the Stabilisation and Association Agreement. Trade liberalization and the approximation of national legislation to EU law are important elements thereof, tied to a

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[68] See further, Opinion of Advocate General Sharpston delivered on 21 September 2006, Case C-313/05, Made] ***Brzezinski v. Dyrektor Izby Celnej w Warszawie*** [2007] ECR 1-513, paragraph 55.

[69] Case C-393/98 ***Ministerio Publico and Antonio Gomes Valente v Fazenda Publica*** [2001] ECR 1-1327, paragraph 43.

gliding timescale laid down in the Agreement itself. The Serbian authorities should be mindful of the fact that, in the approximation process, the legal concepts, guiding principles and operational tests are often not laid down in the 'black letter' law. One cannot just take the SAA, not primary and secondary EU law at face value, but should attach great importance to the interpretation thereof by the Court of Justice.

Through a case study on the approximated legislation on custom duties and taxes charged over the importation of used vehicles from the EU into the Republic of Serbia, this article has exposed the complex, multi-layered legal framework in which the authorities of (potential) candidate countries are operating when implementing the provisions on the free movement of goods contained in the SAA. As shown, Serbia has the right to maintain customs duties on the importation of goods from the EU, but it is also under the obligation to progressively lower customs rates in accordance with a timetable provided by the SAA, until their final abolition six years after the moment of entry into force of the Agreement. Apart from the customs duties that will eventually be phased out, there should be no further distinction between imported vehicles and vehicles that are already registered in the domestic market. In this paper, we have found that, whereas the black letter of the Serbian tax legislation does not make a distinction on the basis of the origin of the car or the taxpayer, the value of the imported used vehicles is nonetheless increased solely for tax purposes. Firstly, customs authorities have the right to determine the value of the vehicle for the purpose of customs proceedings, which directly impacts the amount of customs duties and the amount of VAT to be paid. Secondly, provisions that regulate the value of used vehicles for the purpose of the 'Tax on the use of motor vehicles' also lead to increases in the value of those vehicles. Notwithstanding the mentioned overestimation of the value of the used vehicles for the purpose of the 'Tax on the use of motor vehicles', the provisions do not distinguish between imported used vehicles and used vehicles already registered in the domestic market, since this tax is to be paid annually at the registration of the motor vehicles by the legal or physical person on whose name they will be registered. Furthermore, our analysis has shown that the tax burden is lower if one buys used vehicles present on the domestic market (and pay TTAR 2,5%) than import used vehicles (and pay CD and VAT 18%), even though, as it is mentioned before, the black letter of the Serbian tax legislation does not make a distinction on the basis of the origin of the car or the taxpayer. It goes without saying that this practice directly and negatively affects these imported goods' competitiveness with the same goods already

registered in the domestic market and is unjustified under the provisions of the Stabilisation and Association Agreement.

In crafting their national law and administrative practice, Serbia and its neighbouring countries can benefit from the experiences of old and new EU Member States alike. The rulings for non-discriminatory treatment of used vehicles originating from EU, settled in the case law analyzed in this paper, give an illustrative picture of the proper ways of overcoming the practical issues that could otherwise lead to a breach of the SAA. A similar logic applies to other economic policy areas falling under the umbrella of the SAA and should be heeded by the Serbian authorities and judiciary responsible for the proper implementation and enforcement of the Stabilisation and Association Agreement.